DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-1279
Title: Federal Communications Commission, et al., Petitioners
v.
AT&T Inc., et al.
Docketed: April 22, 2010
Linked with 09A742
Lower Ct: United States Court of Appeals for the Third Circuit
Case Nos.: (08-4024)
Decision Date: September 22, 2009
Rehearing Denied: November 23, 2009

Questions Presented

---Date---	--------Proceedings and Orders---------------------
Feb 10 2010	Application (09A742) to extend the time to file a petition for a writ of certiorari from February 21, 2010 to March 24, 2010, submitted to Justice Alito.
Feb 12 2010	Application (09A742) granted by Justice Alito extending the time to file until March 23, 2010.
Mar 12 2010	Application (09A742) to extend further the time to file a petition for a writ of certiorari from March 23, 2010 to April 22, 2010, submitted to Justice Alito.
Mar 15 2010	Application (09A742) granted by Justice Alito extending the time to file until April 22, 2010.
Apr 22 2010	Petition for a writ of certiorari filed. (Response due May 24, 2010)
May 11 2010	Brief of respondent COMPTEL in support filed.
May 14 2010	Order extending time to file response to petition to and including July 13, 2010.
May 24 2010	Brief amici curiae of Public Citizen, et al. filed.
Jul 13 2010	Brief of respondent AT&T Inc. in opposition filed.
Jul 28 2010	DISTRIBUTED for Conference of September 27, 2010.
Jul 30 2010	Reply of petitioners Federal Communications Commission, et al. filed. (Distributed)
Sep 28 2010	Petition GRANTED. Justice Kagan took no part in the consideration or decision of this petition.
Oct 18 2010	Motion to dispense with printing the joint appendix filed by petitioner Federal Communications Commission, et al.
Nov 1 2010	Motion to dispense with printing the joint appendix filed by petitioner GRANTED. Justice Kagan took no part in the consideration or decision of this motion.
Nov 8 2010	SET FOR ARGUMENT ON Wednesday, January 19, 2011.
Nov 9 2010	Brief of petitioners Federal Communications Commission, et al. filed.
Nov 10 2010	Brief of respondent COMPTEL in support of petitioners filed. (Distributed)
Nov 12 2010	CIRCULATED.
Nov 15 2010	Brief amici curiae of The Reporters Committee for Freedom of the Press, et al. filed. (Distributed)
Nov 16 2010	Brief amici curiae of Electronic Privacy Information Center (EPIC), et al. filed. (Distributed). REPRINTED
Nov 16 2010	Brief amicus curiae of Collaboration on Government Secrecy filed. (Distributed)
Nov 16 2010	Brief amici curiae of Project On Government Oversight, et at. filed. (Distributed)
Nov 16 2010	Brief amicus curiae of Constitutional Accountability Center filed. (Distributed)
Nov 16 2010	Brief amicus curiae of Free Press filed. (Distributed)
Nov 16 2010	Brief amici curiae of Citizens for Responsibility and Ethics in Washington, et al. filed. (Distributed)
Dec 9 2010	Brief of respondent AT&T Inc. filed. (Distributed)

Dec 15 2010	Brief amicus curiae of National Association of Manufacturers filed. (Distributed)
Dec 16 2010	Brief amicus curiae of Chamber of Commerce of the United States of America filed. (Distributed)
Dec 16 2010	Brief amicus curiae of Business Roundtable filed. (Distributed)
Jan 10 2011	Reply of respondent COMPTEL in support of petitioners filed. (Distributed)
Jan 10 2011	Reply of petitioners Federal Communications Commission, et al. filed. (Distributed)
Jan 11 2011	Administrative record received from the Office of the Solicitor General. (1 envelope)
Jan 19 2011	Argued. For petitioners: Anthony A. Yang, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For respondents: Geoffrey M. Klineberg, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

09-1279 APR 22 2010

No. OFFICE OF THE CLERK

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, PETITIONERS

v.

AT&T INC. AND COMPTEL

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. 552(b)(7)(C), exempts from mandatory disclosure records or information compiled for law enforcement purposes when such disclosure could reasonably be expected to constitute an unwarranted invasion of "personal privacy." The question presented is:

Whether Exemption 7(C)'s protection for "personal privacy" protects the "privacy" of corporate entities.

PARTIES TO THE PROCEEDING

The petitioners are the Federal Communications Commission and the United States of America.

Respondent AT&T Inc. was the petitioner in the court of appeals. Respondent CompTel was an intervenor below.

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No.

FEDERAL COMMUNICATIONS COMMISSION AND
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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Federal Communications Commission (FCC or Commission) and the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 582 F.3d 490. The order of the Commission (App., *infra*, 19a-33a) is reported at 23 F.C.C.R. 13,704.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 2009. A petition for rehearing was denied on November 23, 2009 (App., *infra*, 45a-46a). On February 12, 2010, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including March 23, 2010. On March 15, 2010, Justice Alito further extended the time to April 22, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Exemption 7(C) of the Freedom of Information Act exempts from mandatory disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information * * * (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). Other pertinent provisions are set out in the appendix to the petition (App., *infra*, 47a-60a).

STATEMENT

1. a. In 1966, Congress enacted the Freedom of Information Act (FOIA), 5 U.S.C. 552, as an amendment to the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, in order to limit the broad discretion that federal agencies previously had exercised concerning the publication of governmental records. *DOJ* v. *Reporters Comm. for Freedom of Press*, 489 U.S. 749, 754 (1989) (*Reporters Committee*); FOIA, Pub. L. No. 89-487, 80

Stat. 250 (amending APA § 3); see Act of June 5, 1967, Pub. L. No. 90-23, 81 Stat. 54 (codifying FOIA as positive law at 5 U.S.C. 552). Under FOIA, federal agencies generally must make records available to "any person" who has submitted a "request for [such] records," unless a statutory exemption applies. See 5 U.S.C. 552(a)(3)(A); 5 U.S.C. 552(b) (FOIA exemptions); *Reporters Committee*, 489 U.S. at 754-755. If an agency fails to comply with its disclosure obligations within FOIA's statutory time limits, 5 U.S.C. 552(a)(6)(A) and (B), the requester may file an action in district court to compel disclosure. 5 U.S.C. 552(a)(4)(B) and (6)(C).

Three FOIA exemptions are relevant to the Court's consideration of the issues in this case. First, Exemption 6 applies to "personnel and medical files and similar files" the disclosure of which "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). "Congress' primary purpose in enacting Exemption 6 was to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State* v. *Washington Post Co.*, 456 U.S. 595, 599 (1982). Exemption 6 was designed to strike the "proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information." *Ibid.* (quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966) (*1966 House Report*)); see *Department of the Air Force* v. *Rose*, 425 U.S. 352, 372 (1976); *DoD* v. *FLRA*, 510 U.S. 487, 495 (1994) (discussing "basic principles" governing FOIA).

Second, Exemption 7, as enacted in 1966, exempted "investigatory files compiled for law enforcement purposes" unless the files were "available by law to a party other than an agency." 5 U.S.C. 552(b)(7) (1970). After courts construed the exemption to cover "all material found in [such] investigatory file[s]," Congress narrowed Exemption 7 in 1974 by enumerating six specific categories of law-enforcement records that are exempt from mandatory disclosure. *FBI* v. *Abramson*, 456 U.S. 615, 627 & n.11 (1982). As relevant here, one category is encompassed by Exemption 7(C), which exempts from mandatory disclosure records or information compiled for law-enforcement purposes if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C).[1] "Congress gave special attention to the language in Exemption 7(C)," *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 166 (2004), and added its "protection for personal privacy" in order to "make clear that the protections in the sixth exemption for personal privacy also apply to disclosure under the seventh exemption." 120 Cong. Rec. 17,033 (1974) (statement of Sen. Hart).

Finally, Exemption 4 applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4). Because the exemption applies to information "obtained from a person," *ibid.*, and the APA (including FOIA) defines the term "person" to include "an individual, partnership, corporation, association, or public or private organization other than [a federal] agency," 5 U.S.C. 551(2). Exemption 4 protects commercial and financial information that the government obtains from a wide variety of sources, including private corporations and public organizations. Exemption 4 protects privileged and confidential material that "would not customarily be made public by the person from whom it was obtained," including "business sales statistics, inventories, customer lists," and "technical or financial data." *1966 House Report* 10.

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[1] Congress amended Exemption 7(C) to take its present form in 1986, but did not alter the type of "personal privacy" necessary to invoke the exemption. See *Reporters Committee*, 489 U.S. at 756 & n.9, 777 n.22.

b. "FOIA is exclusively a disclosure statute." *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 292 (1979). If one of its exemptions applies, FOIA does not forbid the agency from exercising its "discretion to disclose [the] information." *Id.* at 292-294. But in what is known as a "'reverse-FOIA' suit[ ]," *id.* at 285, a person seeking to prevent an agency's production of records may, in certain circumstances, seek judicial review under the APA of a final agency decision to disclose agency records. See *id.* at 317-318. In such a suit, a court may set aside an agency's decision to disclose if the agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. 706(2)(A). See *Chrysler Corp.*, 441 U.S. at 317-318 (reverse-FOIA suit alleging that disclosure of records was prohibited by the Trade Secrets Act, 18 U.S.C. 1905).

Regulations promulgated by the Federal Communications Commission provide that a FOIA requester who seeks FCC records that are exempt from mandatory disclosure under FOIA must specify the "reasons for inspection and the facts in support thereof." 47 C.F.R. 0.461(c); see 47 C.F.R. 0.457. Under the Commission's regulations, if the records contain material submitted to the agency by a third person, the Commission will provide a copy of the FOIA request to that person and afford the person an opportunity to object to disclosure in certain specified circumstances: if the person previously requested that the records be kept confidential (47 C.F.R. 0.459), if the records are exempt under FOIA Exemption 4 (see 47 C.F.R. 0.457(d)), or if the custodian of records has reason to believe that "the information may contain confidential commercial information." 47 C.F.R. 0.461(d)(3); cf. Exec. Order No. 12,600, §§ 1, 3-5, and 8, 3 C.F.R. 235-237 (1988), *reprinted in* 5 U.S.C. 552 note (directing agencies to provide submitters of certain confidential commercial information with notice of, and an opportunity to object to, agency disclosure). If the records fall within one of FOIA's exemptions and their "disclosure * * * is [not] prohibited by law," the Commission "will weigh the policy considerations favoring non-disclosure against the reasons cited for permitting inspection" and decide whether to produce the records. 47 C.F.R. 0.457; see 47 C.F.R. 0.461(f)(4).

2. This case arises from a FOIA request for FCC records concerning an investigation involving respondent AT&T Inc.[2] AT&T participated in a federal program, the E-Rate Program, administered by the FCC and designed to improve access to advanced telecommunications technology by educational institutions. App., *infra*, 2a. Under the E-Rate Program, AT&T provided equipment and services to elementary and secondary schools and billed the government for the cost. *Ibid.*

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[2] At the time of the FCC's investigation, respondent AT&T was known as SBC Communications, Inc. See App., *infra*, 19a n.1. To avoid confusion, this petition consistently refers to that respondent as AT&T.

By letter dated August 6, 2004, AT&T informed the Commission that it had discovered "certain irregularities" that constituted an "apparent violation of the E-[R]ate rules," resulting in AT&T's over-billing the government for its services. C.A. App. A22; see App., *infra*, 2a-3a. On August 24, 2004, the Commission's Enforcement Bureau (Bureau) issued a Letter of Inquiry to AT&T, notifying the company that the Bureau had initiated an investigation and ordering AT&T to produce information relevant to that investigation. *Id.* at 35a, 41a. AT&T disclosed the information as directed. *Id.* at 41a.

In December 2004, the Bureau terminated its investigation pursuant to an administrative consent decree. See *SBC Commc'ns, Inc.*, 19 F.C.C.R. 24,014 (Enf. Bur. 2004) (order and consent decree). Under that decree, AT&T, without admitting liability, agreed to pay $500,000 to the government and to institute a two-year compliance plan to ensure future compliance with pertinent FCC rules by all AT&T subsidiaries. *Id.* at 24,016-24,019; App., *infra*, 35a-36a.

3. On April 4, 2005, respondent CompTel, a trade association representing some of AT&T's competitors, submitted a FOIA request to the Commission, seeking "[a]ll pleadings and correspondence contained in" the AT&T E-Rate investigation file. C.A. App. A27. The Commission notified AT&T of the FOIA request, and AT&T submitted an objection to disclosure. See *id.* at A28.

a. In August 2005, the Bureau granted CompTel's FOIA request in part and denied it in part. App., *infra*, 34a-44a. The Bureau concluded that portions of the information submitted to the FCC by AT&T were protected from mandatory disclosure under FOIA Exemption 4 because the information "constitute[d] commercial or financial information" that, if disclosed, "could result in substantial competitive harm to [AT&T]." *Id.* at 41a. Under that exemption, the Bureau declined to disclose "commercially sensitive information," including AT&T's "costs and pricing data, its billing and payment dates, and identifying information of [AT&T's] staff, contractors, and the representatives of its contractors and customers." *Id.* at 41a-42a. The Bureau also concluded that FOIA Exemption 7(C) protected from mandatory disclosure information in the agency's investigative file that would invade the privacy of individuals, *id.* at 42a-43a, and explained that it would "withhold the names and identifying information of those individuals." *Id.* at 43a.[3]

The Bureau, however, rejected AT&T's argument that Exemption 7(C) protected from mandatory disclosure all records that the FCC had obtained from AT&T during its investigation. App., *infra*, 42a-43a. The Bureau concluded that records that did not implicate the privacy interests of individuals fell outside Exemption 7(C) because AT&T itself did "not possess 'personal privacy' interests" protected by that exemption. *Ibid.*

b. AT&T filed an administrative appeal from the Bureau's determination, challenging the decision to release the agency's investigative records that the Bureau concluded were subject to mandatory FOIA disclosure. C.A. App. A47; App., *infra*, 22a & n.16. In September 2008, the Commission denied AT&T's administrative appeal. *Id.* at 19a-33a.[4]

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[3] The agency further concluded that internal agency records were exempt from disclosure under Exemption 5. App., *infra*, 43a.

[4] CompTel also filed an administrative appeal from the Bureau's determination. App., *infra*, 22a & n.16. By October 5, 2006, CompTel had constructively exhausted its administrative remedies because the

As relevant here, the Commission rejected AT&T's argument that AT&T is a "corporate citizen" with "personal privacy" rights protected by Exemption 7(C), that AT&T should therefore be "protected from [a] disclosure that would 'embarrass' it," and that the FCC should accordingly withhold "all of the documents that [AT&T] submitted" to the FCC. App., *infra*, 26a (citation omitted). The agency concluded that "established [FCC] and judicial precedent" showed that the "personal privacy" protected under Exemption 7(C) concerns only the privacy interests of individuals, and corporations do not have "'personal privacy' interests within the meaning of [that] [e]xemption." *Id.* at 26a-28a.

FCC had not resolved its administrative appeal within FOIA's 20-day period for rendering a decision. See 5 U.S.C. 552(a)(6)(A)(ii) and (C)(i). On that date, CompTel initiated a FOIA action in the United States District Court for the District of Columbia to compel disclosure. App., *infra*, 23a & n.17. In light of CompTel's pending lawsuit and its conclusion that "FOIA permits such actions," the Commission did not address the merits of CompTel's administrative appeal. *Ibid.*

Meanwhile, AT&T intervened in CompTel's FOIA action, which the district court stayed pending the FCC's resolution of AT&T's administrative appeal. See App., *infra*, 23a & n.19. The district court explained that AT&T had asserted a reverse-FOIA claim against the FCC in district court, but that APA review was unavailable at that time because the FCC had yet to take "final agency action" subject to judicial review. *CompTel* v. *FCC*, Civ. No. 06-1718 (D.D.C. Mar. 5, 2008), slip op. 4 (citing 5 U.S.C. 704). Although the court noted that it had authority to decide CompTel's FOIA claim, it concluded that judicial economy warranted a stay until "there is a final agency action on AT&T's intra-agency appeal," in order to "permit[] the court to simultaneously address the issues raised by [all parties]." *Id.* at 6. The district court subsequently denied CompTel's motion to compel a final agency decision within 30 days. *CompTel* v. *FCC*, Civ. No. 06-1718 (D.D.C. May 5, 2008) (order). No further action has been taken in CompTel's FOIA case, which does not affect the question presented in this petition.

The Commission explained that this Court's decision in *Reporters Committee* indicated that the "personal privacy" interest protected by both Exemption 6 and Exemption 7(C) is "applicable only to individuals," because *Reporters Committee* relied on Exemption 6 to construe Exemption 7(C) and, as AT&T "admit[ted]," "Exemption 6 applies only to individuals." App., *infra*, 30a & n.46 (citing AT&T letter brief at C.A. App. A52). The Commission further reasoned that judicial decisions demonstrate that Exemption 7(C)'s purpose is to avoid damage to "personal reputation, embarrassment, and * * * harassment * * * that an individual might suffer from disclosure." *Id.* at 29a. Such harms, the Commission concluded, are distinct from the potential impact of disclosure on a purely "legal entity like a corporation." *Ibid.*

4. The court of appeals granted AT&T's petition for review under the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.*, and remanded for further agency proceedings. App., *infra*, 1a-18a.[5]

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[5] The Hobbs Act vests the courts of appeals with exclusive jurisdiction over petitions for review of certain agency orders. 28 U.S.C. 2342. The "nature and attributes of judicial review" under the Hobbs Act are governed by the APA's judicial-review provisions. *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987); see *id.* at 277 (citing APA standard of review in 5 U.S.C. 706(2)(A)).

Consistent with the government's position, the court of appeals concluded that it possessed Hobbs Act jurisdiction over this reverse-FOIA action because AT&T's suit challenged an "order of the Commission under [the Communications Act of 1934, 47 U.S.C. 151 *et seq.*]," 47 U.S.C. 402(a). See App., *infra*, 6a-7a. The court explained that AT&T's challenge to the Commission's order regarding disclosure based on that order's alleged inconsistency with FCC regulations was a challenge subject to Hobbs Act review, see 28 U.S.C. 2342(1), and that "[c]ourts

The court of appeals held, in pertinent part, that "FOIA's text unambiguously indicates that a corporation may have a 'personal privacy' interest within the meaning of Exemption 7(C)." App., *infra*, 13a; see *id.* at 9a-14a. The court reasoned that "FOIA defines 'person' to include a corporation" and that the term "personal" is "derived" from the word "person" and is simply the "adjectival form" of that defined term. *Id.* at 10a-12a (discussing APA definition at 5 U.S.C. 551(2)). In light of that view, the court rejected the contention that the statutory phrase "personal privacy" should be construed to reflect the "ordinary meaning" of the word "personal." *Id.* at 12a.

The court of appeals assumed *arguendo* that FOIA's protection for "personal privacy" in Exemption 6 "applies only to individuals (and not to corporations)," but decided that this assumption did not undermine its understanding of the scope of "personal privacy" protected by Exemption 7(C). App., *infra*, 13a. The court reasoned that Exemption 6 expressly applies to "personnel and medical files," 5 U.S.C. 552(b)(6), and that particular statutory phrase "limits Exemption 6 to individuals because only individuals (and not corporations) may be the subjects of such files." App., *infra*, 13a.

Having concluded that "FOIA's text unambiguously" resolved the case, the court of appeals declined to "consider the parties' arguments concerning statutory purpose, relevant (but non-binding) case law, and legislative history." App., *infra*, 13a-14a. The court nevertheless expressed the view that its interpretation advanced Exemption 7(C)'s purpose by providing privacy protection

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have consistently held that an [FCC] order" allegedly violating FCC regulations is subject to such review. App., *infra*, 7a & n.2.

to corporations because, as the court saw it, "[c]orporations, like human beings, are routinely involved in law enforcement investigations" and, "like human beings, face public embarrassment, harassment, and stigma because of that involvement." *Id.* at 14a n.5. The court also expressed the view that D.C. Circuit decisions indicating that the protections for privacy in Exemptions 6 and 7(C) apply to "individuals only" were based on atextual considerations that did "not impugn [the Third Circuit's] textual analysis." *Id.* at 14a n.6. The court accordingly "decline[d] to follow" the D.C. Circuit's decisions "to the extent that" they "can be read to conflict with [the] textual analysis" above. *Id.* at 15a n.6.

The court of appeals declined to examine how "AT&T's 'personal privacy'" should be balanced against any public interest in disclosure, explaining that the Commission had not conducted such Exemption 7(C) balancing in the first instance. App., *infra*, 15a-16a. The court accordingly "remand[ed] the matter to the FCC with instructions to determine" whether the requested "disclosure 'could reasonably be expected to constitute an unwarranted invasion of personal privacy.'" *Id.* at 17a (quoting 5 U.S.C. 552(b)(7)(C)).

REASONS FOR GRANTING THE PETITION

The court of appeals has held that FOIA's statutory protection for "personal privacy" in Exemption 7(C) extends beyond the personal privacy interests of individuals and protects the so-called "privacy" of inanimate corporate entities. The court based that holding on what it viewed as the meaning of the phrase "personal privacy," reasoning that the word "personal" in that phrase must encompass all the types of entities that Congress included within the APA's definition of "person."

Under that reasoning, the "personal privacy" safeguarded by Exemption 7(C) would belong not only to corporations and other private organizations, but also to state, local, and foreign governments and governmental components. Thus, if the Third Circuit's decision is not overturned, federal agencies must attempt to balance previously non-existent "personal privacy" interests of business and governmental entities against the public interest in disclosure to determine whether releasing agency records would constitute an unwarranted invasion of such "privacy" under Exemption 7(C). The court of appeals' decision finds no support in FOIA's text or any judicial decision construing Exemption 7(C) in the 35 years since its enactment. The court's textual analysis disregards basic tenets of statutory construction, and it is in significant tension with the D.C. Circuit's longstanding interpretation of FOIA's privacy exemptions.

The court of appeals' ruling threatens to revolutionize the manner in which the federal government must process hundreds of thousands of FOIA requests each year.[6] Federal agencies have for decades processed FOIA requests under the previously settled understanding that corporations and other non-human entities have no interest in "personal privacy" protected by FOIA. The court's ruling, if allowed to stand, also threatens to impose barriers to the public disclosure of government records concerning corporate malfeasance in government programs that the public has a right to review. Certiorari is warranted.

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[6] In fiscal year 2008, the most recent year for which data has been compiled, the government received more than 605,000 FOIA requests and expended approximately $338 million on FOIA-related activities. See U.S. Dep't of Justice, Office of Information Policy, *FOIA Post: Summary of Annual FOIA Reports for Fiscal Year 2008*, http://www.justice.gov/oip/foiapost/2009foiapost16.htm.

I. THE COURT OF APPEALS ERRED IN CONSTRUING EXEMPTION 7(C) TO PROTECT CORPORATE "PERSONAL PRIVACY"

The court of appeals erred in holding that corporations possess "personal privacy" interests under FOIA Exemption 7(C). The court reasoned that Congress defined the term "person" to include corporations and that the phrase "personal privacy" must reflect that definition. But Congress did not define the relevant statutory phrase in Exemption 7(C)—"personal privacy"—and that phrase has been uniformly understood since the 1974 enactment of Exemption 7(C) to protect only the privacy interests of individuals. Traditional tools of statutory construction confirm that the prevailing understanding of Exemption 7(C) is correct: Corporations do not possess "personal privacy" under FOIA.

A. The meaning of the phrase "personal privacy" in Exemption 7(C) "turns on 'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *Nken* v. *Holder*, 129 S. Ct. 1749, 1756 (2009) (quoting *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997)). Those interpretive benchmarks—"the bare meaning of the word[s]" and their "placement and purpose in the statutory scheme," *Bailey* v. *United States*, 516 U.S. 137, 145 (1995)—demonstrate that Exemption 7(C)'s protection for "personal privacy" extends only to individuals.

1. The word "personal" by itself is most naturally understood to concern individuals alone. Dictionaries reflect that "personal" normally means "of or relating to a particular person" and "affecting one individual or

each of many individuals," "relating to an individual," or "relating to or characteristic of human beings as distinct from things." *Webster's Third New International Dictionary* 1686 (1966); see *The American Heritage Dictionary of the English Language* 978 (1976) ("personal" means "[o]f or pertaining to a particular person; private; one's own *personal affairs*," and "[c]oncerning a particular individual and his intimate affairs"). Under these definitions, characteristics of a corporation, in contrast to those of an individual, would not commonly be understood to be "personal" traits.

Moreover, when "personal" is joined with the word "privacy" in Exemption 7(C), the resulting statutory phrase invokes background principles that reflect an exclusive focus on individuals. The law ordinarily protects personal privacy to safeguard human dignity and preserve individual autonomy. See generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890), cited in *Reporters Committee*, 489 U.S. at 763 n.15 (construing Exemption 7(C)). Such concepts do not comfortably extend to a corporation, which "exist[s] only in contemplation of law" as "an artificial being, invisible, [and] intangible." *Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819) (Marshall, C.J.); cf. *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 779 n.14 (1978) (corporations possess no rights that are "purely personal"). Indeed, in other contexts, it is established that a "corporation * * * has no personal right of privacy," Restatement (Second) of Torts § 652I cmt. c (1977) (torts for invasion of privacy), and, for at least half a century it has been "generally agreed that the right to privacy is one pertaining only to individuals." William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 408-409 & n.207 (1960) (citing cases). See also *United*

States v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950) (stating that "corporations can claim no equality with individuals in the enjoyment of a right to privacy" in the Fourth Amendment context).

2. FOIA's broader context likewise demonstrates that Exemption 7(C)'s protection for "personal privacy" applies only to individuals. Congress specifically modeled Exemption 7(C) on Exemption 6's "personal privacy" exemption, which itself protects only the privacy interests of individuals.

"[I]dentical * * * phrases within the same statute should normally be given the same meaning." *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007). That interpretive rule has particular force here, because Congress transferred the phrase "personal privacy" from Exemption 6 to Exemption 7(C) in order to "make clear that the protections in the sixth exemption for personal privacy also apply to disclosure under" Exemption 7. 120 Cong. Rec. at 17,033 (statement of Sen. Hart); see *id.* at 17,040 (memorandum letter of Sen. Hart); cf. *FBI* v. *Abramson*, 456 U.S. 615, 627 n.11 (1982) (discussing Senator Hart's role as "the sponsor of the 1974 amendment").

Exemption 6, in turn, has long been interpreted as applying only to individuals. This Court has emphasized that "Congress' primary purpose in enacting Exemption 6 was to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State* v. *Washington Post Co.*, 456 U.S. 595, 599 (1982). Accordingly, the process of determining whether a disclosure would result in a "clearly unwarranted" invasion of personal privacy triggering the exemption "require[s] a balancing of the *individual's* right of privacy against" the public interest in disclosure. *Department of the Air Force* v. *Rose*, 425 U.S. 352, 372 (1976) (emphasis added). That specific focus on the individual derives directly from Congress's declared purpose to avoid "*harm [to] the individual*" from unwarranted disclosure. *Washington Post Co.*, 456 U.S. at 599 (quoting *1966 House Report* 11); see S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965) (Exemption 6 is designed to "protect[] * * * an individual's private affairs from unnecessary public scrutiny.").

Exemption 6's focus on the interest of real persons was clearly established in 1974, when Congress incorporated Exemption 6's "personal privacy" protection into Exemption 7(C). By 1970, the leading treatise on administrative law and FOIA had concluded that "a corporation cannot claim 'personal privacy'" under Exemption 6 because the phrase "'personal privacy' always relates to individuals." Kenneth Culp Davis, *Administrative Law Treatise* § 3A.22, at 163-164 (1970 Supp.). Professor Davis explained that the APA's "definition of 'person'" was "irrelevant" in this context because Congress "d[id] not use that term" in Exemption 6. *Ibid.* (Congress used "the statutory language of 'personal privacy,'" not "the privacy of any person"); see John A. Hoglund & Jonathan Kahan, Note, *Invasion of Privacy and the Freedom of Information Act: Getman v. NLRB*, 40 Geo. Wash. L. Rev. 527, 540 (1972) (emphasizing that "the interest exemption 6 seeks to safeguard is that of individual privacy"); *id.* at 529-530 & nn.19-20 (examining legislative history).

Courts similarly emphasized that the "personal privacy" protected under Exemption 6 was limited to the privacy of individuals. Based on the "statute and its legislative history," lower courts had determined that the exemption required a balancing of "the potential invasion of *individual* privacy" against "a public interest purpose for disclosure of [the] personal information." *Wine Hobby USA, Inc.* v. *IRS*, 502 F.2d 133, 136 & n.12 (3d Cir. 1974) (emphasis added) (quoting *Getman* v. *NLRB*, 450 F.2d 670, 677 n.24 (D.C. Cir. 1971)); accord *Rural Housing Alliance* v. *USDA*, 498 F.2d 73, 77 & n.13 (D.C. Cir. 1974) (Exemption 6 is "designed to protect individuals from public disclosure of intimate details of their lives"); *Getman*, 450 F.2d at 674 & n.10 (Exemption 6 protects "the right of privacy of affected individuals"); see also *Rose* v. *Department of the Air Force*, 495 F.2d 261, 269 (2d Cir. 1974) (The "statutory goal of Exemption Six" is "a workable compromise between individual rights 'and the preservation of public rights to Government information'") (citation omitted), aff'd, 425 U.S. 352 (1976).

This Court "can assume that Congress legislated against this background of law, scholarship, and history * * * when it amended Exemption 7(C)" in 1974. *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 169 (2004). In fact, the Congressional Record demonstrates that the prevailing interpretation of "personal privacy" was apparent to Congress in 1974. After Senator Hart proposed Exemption 7(C) and emphasized that it would, if enacted, extend Exemption 6's "protection for personal privacy" into the law-enforcement-record context, 120 Cong. Rec. at 17,033, a colleague introduced into the record a decision expressly holding that "the right to privacy envisioned in [Exemption 6] is personal and cannot be claimed by a corporation or association." *Id.* at 17,045 (reprinting *Washington Research Project, Inc.* v. *HEW*, 366 F. Supp. 929, 937-938 (D.D.C. 1973) (holding that the identity of organizations, unlike the "identity of * * * individuals," cannot be withheld under Exemption 6), aff'd in part on other grounds, 504 F.2d 238 (D.C. Cir. 1974)).

In the wake of the 1974 enactment of Exemption 7(C), Attorney General Edward Levi issued an interpretive memorandum concluding that Congress's use of "[t]he phrase 'personal privacy' [in Exemption 7(C)] pertains to the privacy interests of individuals" and "does not seem applicable to corporations or other entities." U.S. Dep't of Justice, *Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act* 9 (1975) (*1975 FOIA Memorandum*). The memorandum, which this Court has repeatedly cited as a reliable interpretation of the 1974 amendments, see *Favish*, 541 U.S. at 169; *Abramson*, 456 U.S. at 622 n.5, further explained that Exemption 7(C) should be interpreted in light of "the body of court decisions" that interpret Exemption 6. See *1975 FOIA Memorandum* 9.[7]

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[7] Attorney General Levi's 1975 memorandum reflected an evolution in the Department of Justice's understanding of Exemption 6. In 1967, one year after Congress enacted FOIA, Attorney General Ramsey Clark described Exemption 6 as protecting "the privacy of any person" and stated that "the applicable definition of 'person,' which is found in section 2(b) of the Administrative Procedure Act, would include corporations and other organizations as well as individuals." U.S. Dep't of Justice, *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 36-37 (1967) (*1967 FOIA Memorandum*). Attorney General Clark then qualified his statement by observing that Exemption 6 normally would protect "the privacy of individuals rather than of business organizations." *Id.* at 37.

That initial description of Exemption 6 was promptly criticized as premised on an erroneous view that the statute protected "the privacy of any person," even though Congress employed the phrase "personal privacy" and did "not use th[e] term" "person." Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 799 (1967). Moreover, the Attorney General's description found no

3. In the more than 35 years since the enactment of Exemption 7(C), until the decision below, there was unanimity among courts and commentators that the "personal privacy" protections in Exemptions 6 and 7(C) apply only to individuals. The D.C. Circuit, which has jurisdiction of appeals from the district court that has universal jurisdiction over FOIA actions, see 5 U.S.C. 552(a)(4)(B), has repeatedly emphasized that "businesses themselves do not have protected privacy interests under Exemption 6." *Multi AG Media LLC* v. *USDA*, 515 F.3d 1224, 1228 (2008); see *Sims* v. *CIA*, 642 F.2d 562, 572 n.47 (D.C. Cir. 1980) ("Exemption 6 is applicable only to individuals."); *National Parks & Conservation Ass'n* v. *Kleppe*, 547 F.2d 673, 685 n.44 (D.C. Cir. 1976) ("The sixth exemption has not been extended to protect the privacy interests of businesses or corporations."). And in *Washington Post Co.* v. *DOJ*, 863 F.2d 96, 100 (D.C. Cir. 1988), the court concluded that Exemption 7(C) provides no privacy protection for "[i]nformation relating to business judgments and relationships." Those decisions reflect judicial recognition that both exemptions protect the same interest in "per-

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support in the legislative history cited in his analysis, which described Exemption 6 as protecting the "individual's right of privacy" and preventing "harm [to] the individual." *1967 FOIA Memorandum* 36 (quoting *1966 House Report* 11). No court subsequently endorsed this aspect of the Attorney General's analysis, and by 1974 courts and commentators had concluded that Exemption 6 protected individuals alone. See pp. 16-18, *supra*. In 1975, General Levi agreed with the uniform body of law and commentary and concluded that "[t]he phrase 'personal privacy' * * * does not seem applicable to corporations." *1975 FOIA Memorandum* 9.

sonal privacy,"[8] which does not encompass a purely corporate interest in confidentiality.[9]

Similarly, in 1981, then-Professor Scalia testified that "[p]erhaps the most significant feature" of the 1974 FOIA amendments to Exemption 7 was that they did not protect "what might be called associational or institutional privacy" from requests under FOIA for disclosure of investigatory records about "corporations, unions," and other "independent institutions." 1 *Freedom of Information Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*,

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[8] See, *e.g.*, *Forest Serv. Employees for Envtl. Ethics* v. *USFS*, 524 F.3d 1021, 1024 n.2 (9th Cir. 2008) ("[T]he only distinction between the balancing tests applied [by Exemptions 6 and 7(C)] is the 'magnitude of the public interest' required to override the respective privacy interests they protect."); *Horowitz* v. *Peace Corps*, 428 F.3d 271, 279 & n.2 (D.C. Cir. 2005) (analyzing Exemption 6 "privacy interest" based on Exemption 7(C) decisional law; explaining that "the difference between the standards for the two exemptions 'is of little import' except when analyzing 'the magnitude of the public interest that is required to override the respective privacy interests protected by the exemptions'") (quoting *DoD*, 510 U.S. at 496 n.6); *FLRA* v. *Department of Veterans Affairs*, 958 F.2d 503, 510 (2d Cir. 1992) (explaining that the balance between personal privacy and any public interest in disclosure is different under Exemptions 6 and 7(C), but that the "degree of invasion to a privacy interest" necessary to trigger that balance is the same).

[9] Agency records concerning corporations will sometimes implicate "personal privacy" and therefore may be withheld on the ground that disclosure could constitute an unwarranted invasion of the privacy interests of an individual. For instance, Exemptions 6 and 7(C) "appl[y] to financial information in business records when the business is individually owned or closely held and 'the records would necessarily reveal at least a portion of the owner's personal finances.'" *Multi AG Media LLC*, 515 F.3d at 1228-1229 (Exemption 6) (citation omitted); see *Consumer's Checkbook* v. *HHS*, 554 F.3d 1046, 1051 (D.C. Cir. 2009) (Exemption 6), cert. denied, No. 09-538 (Apr. 19, 2010).

97th Cong., 1st Sess. 957-958 (1981). The Exemption 7 amendments, he explained, gave no "protection [to] those institutions' deliberate and consultative processes" and enabled FOIA requesters to "impair[]" the "privacy * * * of [such] institutions." *Id.* at 958. See also 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 5.12, at 373 (2010) (Exemption 6 "does not extend to information concerning corporations" because it "provides a qualified exemption only for 'personal privacy.'").

4. The structure of FOIA's other exemptions further confirms that Exemption 7(C) protects only the privacy of individuals. Corporations have a legitimate interest in preserving the secrecy of certain information, and Congress addressed the need to do so through a specific, circumscribed exemption. Congress enacted Exemption 4 to protect from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4). Congress's enactment of an exemption for commercial information (Exemption 4) at the same time as its adoption of a general exemption for "personal privacy" (Exemption 6) demonstrates that its subsequent incorporation of "personal privacy" into Exemption 7's law-enforcement context was not intended to protect organizations with business interests.

B. The court of appeals did not dispute that the "ordinary" meaning of "personal privacy" excludes corporate secrecy. App., *infra*, 12a. It concluded instead that Exemption 7(C) diverges from that normal understanding because the APA defines the term "person" to include corporations and that "defined term" is "the root from which the statutory word at issue [(personal)] is derived." *Ibid.* That analysis, which led the court to conclude that "FOIA's text unambiguously" shows that corporations possess "personal privacy," *id.* at 13a, does not withstand scrutiny.

1. As Professor Davis explained, the statutory definition of "person" is "irrelevant." See p. 17, *supra.* The term "person" does not appear in Exemption 7(C), which instead uses the undefined phrase "personal privacy." Had Congress intended in Exemption 7(C) to invoke the APA's definition of "person" and protect the "privacy of a person," it would have used words to that effect. Cf. 5 U.S.C. 552(b)(4) (protecting "trade secrets or commercial or financial information obtained from a person"), 552(b)(7)(B) (protecting law-enforcement records that "would deprive a person of a right to a fair trial or an impartial adjudication").

The linguistic relationship between the words "person" and "personal"—*i.e.*, that the former is the "root" of the latter, App., *infra*, 12a—cannot itself support the Third Circuit's holding.[10] When Congress specifically intends to extend a statutory definition to such "variants" of a defined term, it has enacted definitional language that reflects this intent. See, *e.g.*, 15 U.S.C. 3802(f) (extending definition to "any variant" of defined term); 17 U.S.C. 101, 111(f); 33 U.S.C. 1122; 42 U.S.C. 7703(1) and (3); 45 U.S.C. 702(10), 802(5). And in the absence of such a provision, the meaning of such a "variant," as of any other term, "is a creature not of definitional possibilities but of statutory context." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). Indeed, "it is a 'fundamental principle of statutory construction * * * that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Textron Lycoming Reciprocating Engine Div.* v. *United Auto. Workers*, 523 U.S. 653, 657 (1998) (*Textron*) (citations omitted).

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[10] Congress's use of the word "personnel" in "personnel * * * files," 5 U.S.C. 552(b)(6), for instance, shares the same "root" as "personal," but "personnel," unlike the APA definition of "person," cannot encompass a corporation.

Viewed in light of that principle, the error of the Third Circuit's decision becomes clear. The phrase "personal privacy" must be understood as a textual unit. See *Textron*, 523 U.S. at 656-657 (explaining that the term "for" cannot be properly understood in isolation from "the meaning of '[s]uits for violation of contracts'"). And the phrase must additionally "be read in [its] context and with a view to [its] place in the overall statutory scheme.'" *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citation omitted). Given its context and purpose in the overall framework of FOIA, the term "personal privacy" refers only to the interest of individuals, and not of corporations. See pp. 14-19, *supra*.

2. The logical implications of the Third Circuit's analysis also underscore the flaws in its decision. The APA defines "person" to include not only an individual and a corporation but also a "public * * * organization other than [a federal government] agency." 5 U.S.C. 551(2). Foreign, state, and local governments and governmental entities therefore are deemed "persons" under the APA and FOIA.[11] The Third Circuit's rationale

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[11] See *Maryland Dep't of Human Res.* v. *HHS*, 763 F.2d 1441, 1445 n.1 (D.C. Cir. 1985); see also *Kansas* v. *United States*, 249 F.3d 1213, 1221-1222 (10th Cir. 2001); *Stone* v. *Export-Import Bank*, 552 F.2d 132, 136-137 (5th Cir. 1977) (foreign governmental agency); cf. *e.g.*, *Bowen* v. *Massachusetts*, 487 U.S. 879, 892-893 (1988) (concluding that a State was a "person suffering legal wrong because of agency action," 5 U.S.C. 702); 5 U.S.C. 701(b)(2) (adopting definition of "person" in 5 U.S.C.

would entitle all such entities to "personal privacy" under Exemption 7(C). It would be exceedingly difficult to identify the parameters of a government agency's so-called "personal privacy," and still more to determine whether disclosure would "constitute an unwarranted invasion" of that privacy, 5 U.S.C. 552(b)(7)(C), by balancing this wholly non-intuitive privacy interest against the public interest in disclosure. Such an endeavor would place federal agencies and the courts in uncharted waters, and there is no reason to believe that Congress intended that extraordinary result.

The court of appeals asserted that, like an individual, a corporation can suffer "public embarrassment, harassment, and stigma." App., *infra*, 14a n.5. But beyond this attempted personification of an entity whose very existence is a legal construct, the court of appeals provided no insight into how a corporation's experience of "personal privacy" is analogous to that of an individual. FOIA Exemption 7(C) protects the privacy of a corporation's employees, and Exemption 4 protects the corporation's confidential commercial information. The FCC properly withheld such information from disclosure under both provisions. *Id.* at 40a-43a. There is no basis for withholding the balance of the FCC's investigative file in the name of a freestanding concept of corporate dignity or autonomy or other attribute of "personal privacy" as that term is understood with reference to human beings.

551(2)). Congress recognized that foreign governments are "persons" that could invoke FOIA, cf. 5 U.S.C. 552(a)(3)(A), and amended FOIA to ensure that the U.S. intelligence community would not produce agency records in response to FOIA requests from such "persons." See 5 U.S.C. 552(a)(3)(E).

3. Finally, the court of appeals erred in concluding that, even if "Exemption 6 applies only to individuals," the term "personal privacy" in Exemption 7(C) properly extends to corporations. App., *infra*, 13a. The court indicated that its understanding of the phrase "personal privacy" would apply uniformly to both provisions but that the separate "phrase 'personnel and medical files'" in Exemption 6 might limit that exemption "to individuals because only individuals (and not corporations) may be the subjects of such files." *Ibid.* That distinction does not withstand analysis.

The disclosure of personnel and medical files may reveal information about corporations and their internal affairs as well as about individuals. Such files, for example, may disclose whether a company discriminated against its employees or has a pattern of providing substandard medical care. Moreover, Exemption 6 applies to individuals who are not the subject of the specific files. The exemption concerns records on an individual that can be "identified as applying to that individual" and therefore can implicate her privacy interests; it does not "turn upon the label of the file" itself. *Washington Post Co.*, 456 U.S. at 601-602 (citation omitted); cf. *Favish*, 541 U.S. at 166 (explaining that Exemption 7(C) protects individuals whose personal information is in law-enforcement files by "mere happenstance"). The phrase "personnel and medical files" therefore cannot justify limiting Exemption 6 to the privacy of individuals if "personal privacy" encompasses corporate privacy interests. Both Exemptions 6 and 7(C) protect only individuals because each includes the same term—"personal privacy"—imposing that limitation. Cf. *Reporters Committee*, 489 U.S. at 768-770 (applying Exemption 6 precedents to analyze an "invasion of privacy" under Exemption 7(C)).

In sum, the Third Circuit's Exemption 7(C) ruling failed to examine the context of FOIA's exemptions, made no effort to explore the lengthy history behind Exemption 6 and 7(C), and offered no convincing textual rationale for its holding. Moreover, the court of appeals did not dispute that its extension of "personal privacy" protection to a corporation was in tension with the decisions of the D.C. Circuit; it instead stated that it "decline[d] to follow" the D.C. Circuit's cases "to the extent that [they] can be read to conflict with [the Third Circuit's] textual analysis" of "personal privacy." App., *infra*, 15a n.6. Review is warranted to correct the court of appeals' unprecedented departure from 35 years of uniform FOIA jurisprudence and commentary interpreting "personal privacy" as limited to individuals.

II. THE COURT OF APPEALS' RULING THREATENS SIGNIFICANT ADVERSE CONSEQUENCES.

The Third Circuit's decision threatens to disrupt the government's administration of FOIA—under which hundreds of thousands of request are filed annually—by dramatically expanding the scope of "personal privacy" interests for FOIA officers to evaluate in responding to requests.

By declaring that a corporation (presumably like any APA "person") possesses "personal privacy" rights under Exemption 7(C), the court of appeals has altered a tenet of FOIA law under which the government has operated for decades. Federal agencies routinely collect information from companies as a result of law-enforcement or regulatory investigations. But agencies have never considered, in processing FOIA requests, whether this information invades so-called corporate privacy interests. Instead, agencies have processed FOIA requests pursuant to the uniform body of jurisprudence confirming that "personal privacy" belongs only to individuals and not to corporations or other entities. The court of appeals' ruling thus throws longstanding FOIA practices and procedures into doubt on a government-wide basis. The decision may require numerous significant changes in the administration of FOIA in order to accommodate a hitherto unknown set of privacy interests.[12]

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[12] For example, an agency processing FOIA requests under its governing regulations not infrequently must determine whether a FOIA exemption applies to the specific documents requested. See, *e.g.*, 10 C.F.R. 9.17(a), 9.25(f) (Nuclear Regulatory Commission); 10 C.F.R. 1004.7(a) and (b)(1) (Department of Energy); 12 C.F.R. 4.12(a) and (b) (Office of the Comptroller of the Currency); 29 C.F.R. 102.117(a)(1), (c)(2)(iii) and (v) (NLRB); 45 C.F.R. 5.33(a), 5.61 (HHS). Under the Third Circuit's holding, an agency making this determination now must analyze whether disclosure would implicate a corporation's privacy interest. And even when an exemption does apply and FOIA does not compel disclosure, an agency's decision whether to exercise discretion to release agency records may turn on the agency's evaluation of the interests protected by FOIA's exemptions. See, *e.g.*, 10 C.F.R. 9.25(f) (authorizing discretionary release of records that are subject to a FOIA exemption if disclosure "will not be contrary to the public interest and will not affect the rights of any person"); 29 C.F.R. 102.117(a)(1) (authorizing discretionary release of certain records if "disclosure would not foreseeably harm an interest protected by a FOIA exemption"); 45 C.F.R. 5.2 (stating general policy of providing "the fullest responsible disclosure consistent with" the need for confidentiality "recognized in [FOIA]" and "the legitimate interests of organizations or persons * * * affected by [the] release"). But cf. 10 C.F.R. 1004.1 (authorizing discretionary release when agency "determines that such disclosure is in the public interest"); 12 C.F.R. 4.12(c) (authorizing discretionary release on a "case-by-case basis").

In this case, for instance, the FCC's regulations "outline[]" the "underlying policy considerations" justifying withholding under each

The new consideration of "corporate personal privacy" likely will also result in the withholding of agency records to which the public should have access, including records documenting corporate malfeasance. At the least, the creation of this new category of privacy interests will increase the burden on agencies of processing and potentially litigating FOIA requests. The decision will undoubtedly spawn objections to FOIA disclosure from companies (or other "persons") that desire the government's investigation of their possible malfeasance to remain secret. And conversely, the decision will generate a new class of FOIA litigation by requesters seeking to restrict the as-yet-undefined category of "personal privacy" held by corporations.

In addition, the new and significant tension between Third Circuit and D.C. Circuit precedent creates especial problems with respect to FOIA litigation. Suits to compel an agency to disclose documents under FOIA may always be brought in the D.C. District Court. 5 U.S.C. 552(a)(4)(B). A FOIA requester seeking agency records that concern a corporation may therefore bring a FOIA suit that will be governed by D.C. Circuit precedent, which does not recognize corporate

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FOIA exemption (*e.g.*, "personal privacy") and specify that, when an exemption authorizes the Commission to withhold the requested records, the Commission "will weigh [such] policy considerations favoring non-disclosure" against the reasons favoring disclosure. 47 C.F.R. 0.457 and (g)(3), 0.461(f)(4). If an agency decision to disclose documents fails to analyze the interests at stake as specified in such regulations, its disclosure order may be set aside on APA review as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. 706(2)(A). In this case, the court of appeals directed the Commission to evaluate AT&T's purported interest in "personal privacy" under the Commission's regulations. See App., *infra*, 7a & n.2, 15a-16a.

"personal privacy" interests. Reverse-FOIA actions under the APA, in turn, may normally be brought where the plaintiff resides or has its principal place of business. See 28 U.S.C. 1391(e) (district court fora); 28 U.S.C. 2343 (court of appeals fora for Hobbs Act cases). Any corporation or entity having a principal place of business in the Third Circuit (which includes Delaware, New Jersey, and Pennsylvania) may therefore elect a forum for a reverse-FOIA action in which the Third Circuit's decision would be binding precedent. As a result, an agency attempting to comply with FOIA will have no way of knowing in advance in which judicial forum—or fora if simultaneous suits are filed—it must defend its decision or which lower court precedents will govern that defense, as this case itself reflects. See p. 8 note 4, *supra* (discussing CompTel's FOIA action in the District of Columbia). The Third Circuit's unprecedented decision will therefore impose substantial legal uncertainty on federal agencies attempting to process vast volumes of FOIA requests.

Certiorari is warranted to restore the interpretation of "personal privacy" that has governed Exemption 7(C) since its enactment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2010

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-4024

AT&T INC, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA, RESPONDENT

COMPTEL, INTERVENOR

[Filed: Sept. 22, 2009]

On Petition for Review of an Order of the
Federal Communications Commission

OPINION OF THE COURT

Before: FUENTES, CHAGARES, and TASHIMA[*], Circuit Judges.

CHAGARES, Circuit Judge.

The Freedom of Information Act ("FOIA"), 5 U.S.C. §§ 551-59 [*sic*], requires a federal agency to disclose certain documents within its possession. But FOIA exempts from mandatory disclosure "records or information compiled for law enforcement purposes . . . to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy," § 552(b)(7)(C) ("Exemption 7(C)"), and defines "person" to "include an individual, partnership, corporation, association, or public or private organization other than an agency," § 551(2). Human beings have such "personal privacy." This case requires us to determine whether corporations do, as well.

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[*] Honorable A. Wallace Tashima, Senior Judge for the United States Court of Appeals for the Ninth Circuit, sitting by designation.

AT&T, Inc. ("AT&T") argued that the Federal Communications Commission ("FCC") could not lawfully release documents obtained during the course of an investigation into an alleged overcharging on the ground that disclosure would likely invade the company's "personal privacy." The FCC rejected AT&T's argument and held that a corporation, as a matter of law, has no "personal privacy" in the first place. AT&T filed a petition for review. We will grant the petition and remand to the FCC for further proceedings.

I.

AT&T participated in a federal program administered by the FCC, called "E-Rate," that was designed to increase schools' access to advanced telecommunications technology. As part of the program, AT&T provided equipment and services to elementary and secondary schools, and then billed the Government for the cost of the equipment and services. In August 2004, AT&T discovered that it might have overcharged the Government for certain work done for the New London, Connecticut school district. AT&T voluntarily reported the matter to the FCC, and the FCC's Enforcement Bureau ("Bureau") conducted an investigation. The two sides ultimately resolved the matter via a consent decree.

During the course of the investigation, the Bureau ordered AT&T to produce, and the company did indeed produce, a range of documents related to its work with the New London schools. Those documents included invoices, internal e-mails providing pricing and billing information for the work done in New London, responses to Bureau interrogatories, names of employees involved in the allegedly improper billing, and AT&T's own assessment of whether and to what extent the employees involved in the overcharging violated its internal code of conduct.

On April 4, 2005, CompTel, a trade association representing some of AT&T's competitors, submitted a FOIA request for "[a]ll pleadings and correspondence contained in" the Bureau's AT&T E-Rate investigation file. Appendix ("App.") 27. AT&T submitted a letter to the Bureau opposing CompTel's request, arguing that the FCC collected the documents that AT&T produced for law enforcement purposes and therefore that the FCC regulations implementing FOIA's exemptions prohibited disclosure. CompTel submitted a reply letter.

On August 5, 2005, the Bureau issued a letter-ruling rejecting AT&T's argument that Exemption 7(C) and the FCC's regulations implementing that exemption prohibit disclosure. That exemption, the Bureau held, does not apply to corporations because corporations lack "personal privacy." AT&T filed an application requesting the FCC to review the Bureau's ruling. On September 12, 2008, the FCC issued an order denying the application and compelling disclosure, again on the ground that Exemption 7(C) does not apply to corporations.

Before addressing the merits, the FCC held that AT&T failed to comply with the FCC's regulations in filing its application for review of the Bureau's order. Generally, only a FOIA requester may file an application for the FCC to review the Bureau's resolution of that request. But, there is an exception. According to 47 C.F.R. § 0.461(i)(1), when a FOIA request for inspection of records submitted in confidence pursuant to §§ 0.457(d) or 0.459 is granted (even if only in part), the submitter of the information—in addition to the requester—may file an application for review. The FCC determined, however, that AT&T did not submit the material it provided to the FCC in confidence pursuant to either of those regulations, because AT&T failed to include with that material a request that the FCC treat that material as confidential. Nevertheless, the FCC stated that it would, "on [its] own motion," consider the merits of AT&T's application for review. App. 10.

The FCC then held that a corporation lacks "personal privacy" within the meaning of Exemption 7(C). It determined that FCC precedent supports this view, App. 10 (citing *Chadmoore Commc'n, Inc.*, 13 FCC Rcd. 23943, 23946-47 ¶ 7 (1998)), as does judicial precedent, App. 11-12 (citing *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 (1989); *Wash. Post Co. v. U.S. Dep't of Justice*, 863 F.2d 96, 100-01 (D.C. Cir. 1988); *Cohen v. EPA*, 575 F. Supp. 425, 429-30 (D.D.C. 1983)). The FCC also concluded that this interpretation accords with the Exemption's purpose to protect key players in an investigation—

targets, witnesses, and law enforcement officers—from the "literal embarrassment and danger" that an individual might suffer, rather than from the "more abstract impact" that a corporation might suffer. App. 12. The FCC stated that a corporation's privacy interests in other contexts—such as Fourth Amendment search-and-seizure law and the discovery regime created by the Federal Rules of Civil Procedure—have no bearing on whether a corporation has a privacy interest in the context of Exemption 7(C). App. 13.

AT&T filed a petition for review of the FCC's order, arguing that the FCC incorrectly interpreted Exemption 7(C) to prevent a corporation from claiming a "personal privacy" interest. AT&T further argues that, should we interpret the statute to allow a corporation to claim a "personal privacy" interest, disclosure of AT&T's documents is, as a matter of law, reasonably likely to constitute an "unwarranted invasion" of that interest. The FCC and CompTel (who entered this case as an intervenor) oppose on the merits and also raise certain threshold issues. CompTel argues that this Court lacks subject matter jurisdiction over AT&T's petition for review and therefore must dismiss. The FCC argues that we should deny the petition for review because AT&T failed to challenge the FCC's determination that AT&T did not comply with certain procedural requirements during the administrative proceedings.[1]

II.

The FCC had jurisdiction to issue its order denying AT&T's application for review. *See* 47 U.S.C. §§ 154(i) (providing that the FCC "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the Communications Act of 1934 ("Communications Act"), 47 U.S.C. §§ 151-615b], as may be necessary in the execution of its functions"), 155(c)(5) (authorizing the FCC to adjudicate applications for review of order issued by delegated panel). CompTel argues that we lack appellate jurisdiction. We disagree.

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[1] Disclosure is currently stayed pending the outcome of this appeal.

CompTel asserts that because the Administrative Procedure Act ("APA") confers AT&T's cause of action, and because 28 U.S.C. § 1331 provides jurisdiction to review an APA claim, the district courts have jurisdiction to hear AT&T's petition for review. CompTel acknowledges that 28 U.S.C. § 2342(1) gives the courts of appeals exclusive jurisdiction over orders "under" the Communications Act within the meaning of 47 U.S.C. § 402(a), but argues that the FCC's order in this matter is not such an order.

CompTel made this argument for the first time to this Court in opposing AT&T's petition for review (which is the first time it could have made this argument). Therefore, there is no decision on this issue to review, and we will address the issue in the first instance.

Section 2342 provides that "[t]he court[s] of appeals . . . ha[ve] exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—(1) all final orders of the [FCC] made reviewable by section 402(a) of title 47." 28 U.S.C. § 2342(1). A "final order[] of the [FCC] made reviewable by section 402(a) of title 47," § 2342(1), is, with certain exceptions not relevant here, "an[] order of the [FCC] under th[e Communications] Act . . . . " 47 U.S.C. § 402(a).

Thus, we have jurisdiction to review the FCC's order adjudicating AT&T's application for review if that order is an order "under" the Communications Act.

Courts have consistently held that an order adjudicating an alleged violation of FCC regulations is an order "under" the Communications Act within the meaning of § 402(a). *See, e.g.*, *Rocky Mountain Radar, Inc. v. FCC*, 158 F.3d 1118, 1119, 1121-23 (10th Cir. 1998) (holding that an order determining that a business violated FCC regulations governing the marketing of radar-jamming devices is an order "under" the Communications Act within the meaning of § 402(a)); *Maier v. FCC*, 735 F.2d 220, 224 (7th Cir. 1984) (holding that order determining that a broadcasting company did not violate FCC regulations governing personal attacks on news subjects is an order "under" the Communications Act within the meaning of § 402(a)).

The FCC's order that is the subject of AT&T's petition for review adjudicated AT&T's claim that disclosure of the information collected by the FCC concerning the E-Rate program in New London would violate FCC regulations implementing Exemption 7(C).[2] Therefore, the order constituted an order "under" the Communications

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[2] FOIA itself does not prohibit disclosure of information falling within its exemptions. When information falls within an exemption, no party can compel disclosure, but the FCC can still make a disclosure on its own accord unless some independent source of law prohibits the agency from doing so. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979) (explaining that, standing alone, FOIA's exemptions "do[] not give [courts] the authority to bar disclosure"). Thus, the disclosure of information falling within an exemption does not violate FOIA itself, but rather an independent source of law. Here, FCC regulations provide this independent source. *See* 47 C.F.R. § 0.457(g)(3) (prohibiting disclosure of information covered by Exemption 7(C)).

Act within the meaning of § 402(a). As a result, § 2342(1) provides that the courts of appeals have exclusive jurisdiction to review that order.[3]

III.

Next, the FCC argues that we must affirm the order because AT&T has failed to challenge the FCC's determination that AT&T failed to comply with relevant procedural requirements in filing its application for review of the Bureau's order. We disagree.

The FCC made this argument for the first time in opposing AT&T's petition for review (which is the first time it could have made this argument). Therefore, there is no decision on this issue to review, and we will address the issue in the first instance. When a decision rests on multiple, independent grounds, a reviewing court should affirm it if one of those grounds is correct. *See Levy v. Sterling Holding Co.*, 544 F.3d 493, 508-09 (3d Cir. 2008). An appellant waives an argument in support of reversal if he does not raise that argument in his opening brief. *FDIC v. Deglau*, 207 F.3d 153, 169 (3d Cir. 2000).

AT&T's procedural default was not an independent ground supporting the FCC's decision. The FCC, in its order, specifically stated that although it recognized AT&T's default, it would consider AT&T's claims on the merits "on [its] own motion." App. 10. This belies the FCC's claim that procedural default was an alternative holding. If it truly was an alternative holding, the FCC would not have needed to make its "own motion" to excuse the default in order to reach the merits. It could have discussed procedural default and then, separately and without any justifying segue, discussed the merits. Had the FCC done this, the procedural default holding would stand as an independent, sufficient ground for denial. That the FCC did not do this tells us that it did not (even in the alternative) base its decision on procedural default.[4]

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[3] CompTel cites two cases, *Chrysler*, 441 U.S. 281, and *GTE Sylvania, Inc. v. Consumer Product Safety Comm'n*, 598 F.2d 790 (3d Cir. 1979), which it claims stand for the proposition that the district courts, not the courts of appeals, have jurisdiction to review reverse-FOIA claims. CompTel is mistaken. True, in each of those cases, the district courts, rather than the courts of appeals, had jurisdiction to hear a reverse-FOIA claim. But neither of those opinions indicate that the laws allegedly barring disclosure in those cases contain any provision triggering the operation of a statute that would have vested jurisdiction exclusively in another court.

IV.

AT&T argues that the FCC incorrectly interpreted Exemption 7(C) when it held that a corporation lacks the "personal privacy" protected by that exemption. We agree with AT&T.

The FCC's interpretation of Exemption 7(C) is not entitled to deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), because FOIA applies government-wide, and no one agency is charged with enforcing it. *ACLU v. Dep't of Def.*, 543 F.3d 59, 66 (2d Cir. 2008) (declining to accord deference to Department of Defense interpretation of FOIA). Thus, we exercise plenary review of the FCC's interpretation of FOIA, and will set aside the FCC's decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See* 5 U.S.C. § 706(2)(A).

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[4] If the FCC lacked the authority to consider the merits on its own motion, then perhaps its order actually did consist of two alternative holdings. If the FCC lacked such authority, then its justification for issuing a merits holding—its "own motion" to excuse procedural default—would have been erroneous, and all that would have remained would be one procedural default holding and one merits holding, with nothing connecting the two. But CompTel does not appear to argue that the FCC lacked such authority, and for good reason: the FCC had it. *See* 47 C.F.R. § 1.3 (allowing the FCC to waive any regulation "for good cause shown").

A.

In 1966, dissatisfied with then-existing statutory mechanisms compelling disclosure of Government records, Congress enacted FOIA to improve public access to information controlled by federal agencies. *See OSHA Data/CIH, Inc. v. U.S. Dep't of Labor*, 220 F.3d 153, 160 (3d Cir. 2000) (describing Congress's intent). FOIA embodies a philosophy of full disclosure: an agency may deny a reasonable request for information only if the information falls into a statutorily delineated exemption. *Id.*

This case concerns the so-called law enforcement exemption, Exemption 7(C), which shields from mandatory disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). FOIA's Exemption 6 also uses the phrase "personal privacy," shielding from compulsory disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." § 552(b)(6). FOIA does not define "personal," but it does define "person" to "include[] an individual, partnership, corporation, association, or public or private organization other than an agency." § 551(2).

Neither the Supreme Court nor this Court has ever squarely rejected a proffered personal privacy interest of a corporation. The most that can be said of the Supreme Court's cases and of our cases is that they suggest that Exemptions 7(C) and 6 frequently and primarily protect—and that Congress may have intended them to protect—the privacy of individuals. *See, e.g., Reporters Comm.*, 489 U.S. at 764 n.16; *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 599 (1982); *Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1058 (3d Cir. 1995) (citing *Landano v. U.S. Dep't of Justice*, 956 F.2d 422, 426 (3d Cir. 1992)); *Manna v. U.S. Dep't of Justice*, 51 F.3d 1158, 1166 (3d Cir. 1995); *Cuccaro v. Sec'y of Labor*, 770 F.2d 355, 359 (3d Cir. 1985) (citing *Lame v. U.S. Dep't of Justice*, 654 F.2d 917, 923 (3d Cir. 1981)).

B.

As the Supreme Court has held, a court must "begin by looking at the language of the [statute]. . . . When [the court] find[s] the terms of a statute unambiguous, judicial inquiry is complete, except 'in rare and exceptional circumstances.'" *Rubin v. United States*, 449 U.S. 424, 429-30 (1981) (quoting *TVA v. Hill*, 437 U.S. 153, 187 n.33 (1978) (quotation marks and citation omitted)).

AT&T argues that the plain text of Exemption 7(C) indicates that it applies to corporations. After all, "personal" is the adjectival form of "person," and FOIA defines "person" to include a corporation. We agree. It would be very odd indeed for an adjectival form of a defined term *not* to refer back to that defined term. *See*

Del. River Stevedores v. DiFidelto, 440 F.3d 615, 623 (3d Cir. 2006) (Fisher, J., concurring) (stating that it is a "grammatical imperative[]" that "a statute which defines a noun has thereby defined the adjectival form of that noun"). Further, FOIA's exemptions indicate that Congress knew how to refer solely to human beings (to the exclusion of corporations and other legal entities) when it wanted to. Exemption 7(F), for example, protects information gathered pursuant to a law enforcement investigation that, if released, "could reasonably be expected to endanger the life or physical safety of any *individual*." 5 U.S.C. § 552(b)(7)(F) (emphasis added). Yet, Congress, in Exemption 7(C), did not refer to "the privacy of any individual" or some variant thereof; it used the phrase "personal privacy."

The FCC and CompTel's text-based arguments to the contrary are unconvincing. They cite Supreme Court case law for the proposition that, whenever possible, statutory words should be interpreted "in their ordinary, everyday senses." *Malat v. Riddell*, 383 U.S. 569, 571 (1966). The ordinary meaning of "person" is human being, so, the argument concludes, "personal" must incorporate this ordinary meaning. This argument is unpersuasive. It fails to take into account that "person"—the root from which the statutory word at issue is derived—is a defined term. *See Biskupski v. Att'y Gen.*, 503 F.3d 274, 280 (3d Cir. 2007) ("If, as here, 'a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning.'" (quoting *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000))).

The FCC and CompTel next argue that FOIA's other uses of the phrase "personal privacy" indicate that the phrase does not encompass corporations. They point to Exemption 6, which shields from mandatory disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(6), and observe that courts have held that this exemption applies only to individuals and not to corporations. Thus, the FCC and CompTel argue, the phrase "personal privacy" in Exemption 6 applies only to individuals, and therefore "personal privacy" in Exemption 7(C) applies only to individuals, as well. This argument is flawed. Suppose (though we express no opinion on the issue) that Exemption 6 applies only to individuals (and not to corporations). This does not mean that *each and every component phrase* in that exemption, taken on its own, limits Exemption 6 to individuals. It means only that *some* language in that exemption does so. The phrase "personnel and medical files" serves this function. It limits Exemption 6 to individuals because only individuals (and not corporations) may be the subjects of such files. Therefore, nothing necessarily can be gleaned about the scope of "personal privacy," because Exemption 6 would apply only to individuals even if "personal privacy," taken on its own, encompasses corporations.

Thus, we hold that FOIA's text unambiguously indicates that a corporation may have a "personal privacy" interest within the meaning of Exemption 7(C). This, for us, ends the matter. *Rubin*, 449 U.S. at 429-30. We need not consider the parties' arguments concerning statutory purpose,[5] relevant (but non-binding) case law,[6] and legislative history.[7]

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[5] Nevertheless, we note that interpreting "personal privacy" according to its plain textual meaning serves Exemption 7(C)'s purpose of providing broad protection to entities involved in law enforcement investigations in order to encourage cooperation with federal regulators. Corporations, like human beings, are routinely involved in law enforcement investigations. Corporations, like human beings, face public embarrassment, harassment, and stigma because of that involvement. Reading "personal privacy" to exclude corporations would disserve Exemption 7(C)'s purpose of encouraging corporations—like human beings—to cooperate and be forthcoming in such investigations. Finally on this topic, "[t]he best evidence of th[e] purpose [of a statutory text] is the statutory text adopted by both Houses of Congress and submitted to the President." *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991). That text, we have explained, demonstrates that a corporation may have "personal privacy" within the meaning of Exemption 7(C).

[6] The Court of Appeals for the District of Columbia Circuit cases discussed by the parties—*Multi Ag Media LLC v. Department of Agriculture*, 515 F.3d 1224 (D.C. Cir. 2008), *Judicial Watch, Inc. v. FDA*, 449 F.3d 141 (D.C. Cir. 2006), and *Washington Post*, 863 F.2d 96—do not impugn our textual analysis. The court in *Multi Ag Media* suggested that "personal privacy" within the meaning of Exemption 6 extends to individuals only. But it appears to have inferred this conclusion from its observation that Congress's main purpose in enacting Exemption 6 was to protect individuals (and not necessarily corporations). *See* 515 F.3d at 1228. We do not believe that inferring the statute's meaning merely from evidence of the enacting Congress's chief purpose is analytically appropriate: " 'the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.' " *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001) (quoting *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1988) (quotation marks omitted)). The *Judicial Watch* court, in applying Exemption 6, considered only individuals' privacy interests in balancing "personal privacy" against the need for public disclosure. Yet the court's description of the parties' arguments

V.

AT&T next argues that, as a matter of law, the invasion of personal privacy caused by the release of the documents the company submitted to the FCC could reasonably be expected to be "unwarranted" within the meaning of Exemption 7(C). We disagree.

AT&T made this argument to the FCC during the administrative proceedings, but because the FCC held that "personal privacy" does not apply to corporations, the FCC did not have occasion to discuss whether a potential invasion of AT&T's "personal privacy" would be

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indicates that the FDA (the federal agency holding the documents in that case), in its attempt to resist disclosure, only cited individual privacy interests in the first place. *See* 449 F.3d at 152-53. Thus, the court never had the occasion to pass on whether "personal privacy" encompasses corporate privacy. Finally, the court in *Washington Post* noted that Exemption 7(C) concerns only "intimate" details, including "marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, and reputation." 863 F.2d at 100. But a corporation, too, has a strong interest in protecting its reputation.

In any event, to the extent that these cases can be read to conflict with our textual analysis, we decline to follow them.

[7] We decline the FCC and CompTel's invitation to examine the legislative history of Exemption 7(C) because we find the text of FOIA to be unambiguous. *See In re Mehta*, 310 F.3d 308, 311 (3d Cir. 2002) ("We look to the text of a statute to determine congressional intent, and look to legislative history only if the text is ambiguous."); *see generally Bruesewitz v. Wyeth, Inc.*, 561 F.3d 233, 244 (3d Cir. 2009) ("We have recognized that legislative history is not without its shortcomings as a tool of interpretation. 'As a point of fact, there can be multiple legislative intents because hundreds of men and women must vote in favor of a bill in order for it to become a law.'") (quoting *Morgan v. Gay*, 466 F.3d 276, 278 (3d Cir. 2006)).

"unwarranted." Therefore, there is no decision on this issue to review.

"[U]nder settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards." *N.C. Fisheries Ass'n, Inc. v. Gutierrez*, 550 F.3d 16, 20 (D.C. Cir. 2008) (quoting *PPG Indus. v. United States*, 52 F.3d 363, 365 (D.C. Cir. 1995)). AT&T attempts to avoid this bedrock principle by noting that "when [a FOIA] request seeks no 'official information' about a Government agency, but merely records that the Government happens to be storing," granting that request would, as a matter of law, constitute a "clearly unwarranted" invasion of personal privacy within the meaning of Exemption 7(C), *Reporters Comm.*, 489 U.S. at 780, so remand would be unnecessary. AT&T argues that none of the AT&T records that CompTel wants disclosed contains "official information" about the FCC or otherwise pertain to the FCC's conduct. Rather, AT&T contends that the request is aimed at gathering information about AT&T, contained in AT&T documents, that "the Government happens to be storing," *id.*, by virtue of the Bureau's investigation. We cannot agree. CompTel's FOIA request does not fit into that narrow category.

CompTel has indeed alleged that it seeks "'official information' about a Government agency." *Id.* For example, in its opposition to AT&T's letter-request to block disclosure, CompTel explains that it seeks information about "the receipt of universal service support [the E-Rate program] for the New London Connecticut

Public Schools." App. 37. CompTel notes that the FCC "terminated the investigation upon issuing an Order adopting a Consent Decree." App. 37. E-Rate has (at least) two participants: AT&T, which provides services to the local school districts (and bills the Government), and the FCC, which actually administers the entire operation. It stands to reason, then, that documents in the FCC's investigative file may shed light on the FCC's administration of E-Rate. This is especially true given that CompTel made (as it was entitled to make) a very broad request for "all" the documents in the investigative file, not merely for those limited to, say, employee home addresses, which would be less likely to provide any insight into the functioning of a federal agency.[8]

We therefore abide by long-established principles of administrative law and will remand the matter to the FCC with instructions to determine, in accordance with our construction of Exemption 7(C), whether disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy," § 552(b)(7)(c).

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[8] Further, determining that each document AT&T submitted to the FCC contains *some* protected content would be difficult enough, but FOIA requires more. We would have to be convinced that every "reasonably segregable *portion*" of each document contains protected information. 5 U.S.C. § 552(b) (flush language) (emphasis added). Holding, on the very limited record before us, that Exemption 7(C) protects every reasonably segregable jot and tittle of each document that AT&T submitted would be truly extraordinary, and, in our view, not an appropriate course of action for a reviewing court to undertake in the first instance.

VI.

For the above reasons, we will grant AT&T's petition for review and remand the matter to the FCC for further proceedings consistent with this opinion.

APPENDIX B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

IN THE MATTER OF SBC COMMUNICATIONS INC.
ON REQUEST FOR CONFIDENTIAL TREATMENT

Adopted: Sept. 9, 2008
Released: Sept. 12, 2008

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION:

1. The Commission has before it an application for review filed by SBC Communications, Inc. (SBC),[1] seeking review of a decision of the Enforcement Bureau (EB or Bureau), which rules on a Freedom of Information Act (FOIA) request by CompTel. SBC appeals that portion of EB's decision that denied in part SBC's request for confidential treatment of records responsive to

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[1] SBC adopted the name AT&T, Inc. (AT&T) following its acquisition of the company by that name. *See http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21850* (company press release). Because, however, the pleadings and rulings before us refer to "SBC," we will generally use the name "SBC" in this memorandum opinion and order to avoid confusion. We will use the name "AT&T" only where the context makes it more appropriate.

CompTel's FOIA request. For the reasons set forth below, we deny SBC's application for review.[2]

I. BACKGROUND

2. On December 16, 2004, EB issued a consent decree[3] terminating its investigation into SBC's compliance with section 254 of the Communications Act, as amended, and Part 54 of the FCC's regulations.[4] CompTel, on April 4, 2005, filed a FOIA request seeking "[a]ll pleadings and correspondence contained in File No. EB-04-IH-0342 [*i.e.*, the investigation of SBC]."[5] In opposing release of the requested documents, SBC, on May 27, 2005, for the first time requested confidential treatment of its submissions in that investigation.[6]

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[2] The procedural history of this case is somewhat complex. For reasons explained in greater detail below, CompTel's own application for review of EB's decision is not before us. We will discuss CompTel's FOIA request and application for review only to the extent necessary to clarify the matters under consideration.

[3] *SBC Communications Inc.*, 19 FCC Rcd 24014 (Enf. Bur. 2004). The consent decree addressed alleged irregularities in invoices submitted by SBC Connecticut to the Schools and Libraries Division of the Universal Service Administrative Company (USAC) for services provided to certain schools and other entities subsidized under the Universal Service Fund "E-Rate" program.

[4] *See* 47 U.S.C. § 254; 47 C.F.R. Part 54.

[5] E-FOIA request from Mary C. Albert, CompTel/ALTS (Apr. 4, 2005).

[6] Letter from Jim Lamoureux, Senior Counsel, SBC Services, Inc., to Judy Lancaster, Enforcement Bureau (May 27, 2005). SBC's request for confidentiality specifically applied to financial documents that it submitted to EB in response to a letter of inquiry issued during the investigation. CompTel opposed SBC's request for confidentiality. Letter from Mary C. Albert, Vice President, Regulatory Policy to Judy Lancaster, Enforcement Bureau (Jun. 28, 2005).

3. The Bureau granted in part and denied in part SBC's request for confidential treatment, and, accordingly, granted in part and denied in part CompTel's FOIA request.[7] The Bureau found that SBC had not complied with the procedures for seeking confidential treatment specified by section 0.459 of the Commission's rules.[8] EB held that SBC "failed to provide a statement of specific reasons for withholding its responses in their entirety," especially because it failed to meet the requirements of section 0.459 that it explain "how disclosure of the information could result in substantial competitive harm" and "whether any of the information for which it seeks protection is already available to the public."[9] The Bureau, however, examined SBC's submissions and determined that certain information in SBC's submissions should be treated as confidential, including "costs and pricing data, its billing and payment dates, and identifying information of SBC's staff, contractors, and the representatives of its contractors and customers." According to EB, such information, if released, was "likely to substantially harm SBC's competitive position," and was therefore exempt from disclosure under FOIA Exemption 4.[10] EB also determined that this in-

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[7] Letter from William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau to Jim Lamoureux, SBC Services, Inc. and Mary C. Albert, Vice President Regulatory Policy, CompTel/ALTS (Aug. 5, 2005) (*FOIA Decision*).

[8] 47 C.F.R. § 0.459.

[9] *FOIA Decision* at 4, *citing* 47 C.F.R. § 0.459(b)(5) and (7).

[10] *FOIA Decision* at 5. *See* 5 U.S.C. § 552(b)(4). Exemption 4 covers "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

formation was not in the public domain.[11] In addition, the Bureau determined that the names of individuals identified in SBC's submission should be withheld from release to protect personal privacy under FOIA Exemptions 6 and 7(C).[12] EB ruled, however, that SBC itself, as opposed to the individuals mentioned in SBC's submissions, did not possess personal privacy interests protected by Exemptions 6 and 7(C).[13] Finally, the Bureau withheld from release pursuant to FOIA Exemption 5[14] drafts of EB pleadings and correspondence, and internal memoranda and e-mails discussing the SBC investigation,[15] which EB determined would disclose the Commission's deliberative process.

4. Both CompTel and SBC filed applications for review of EB's decision.[16] While these pleadings were pending before the Commission, CompTel filed a civil

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[11] *FOIA Decision* at 5. Specifically, EB found that 47 C.F.R. § 54.501(d)(3), which states that service providers' records of rates charged and discounts allowed shall be made available for public inspection, did not require the disclosure of all pricing data in SBC's submissions.

[12] *FOIA Decision* at 5-6, citing 5 U.S.C. §§ 552(b)(7)(C) (records complied for law enforcement purposes . . . [that] could reasonably be expected to "constitute an unwarranted invasion of personal privacy") and 552(b)(6) (. . . files the disclosure of which would "constitute a clearly unwarranted invasion of personal privacy").

[13] *FOIA Decision* at 6.

[14] 5 U.S.C. § 552(b)(5) (inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency).

[15] *FOIA Decision* at 6.

[16] Letter from Mary C. Albert to Samuel Feder (Sept. 6, 2005) (*CompTel Application for Review*); Letter from Jim Lamoureux, SBC Services, Inc., to Samuel Feder, [then] Acting General Counsel (Aug. 19, 2005) (*SBC Application for Review*).

action, pursuant to 5 U.S.C. § 552(a)(4)(B), in the United States District Court for the District of Columbia, seeking a judicial order compelling disclosure of the records withheld by EB.[17] AT&T[18] (as successor to SBC) intervened in CompTel's action as a defendant, and, on March 5, 2008, the court stayed the case.[19] The court concluded that it could not address AT&T's "reverse FOIA" claim that certain records at issue should be withheld from disclosure because AT&T's claim could only be reviewed pursuant to the Administrative Procedure Act after final Commission action.[20] The court concluded further that the interests of judicial economy and efficiency would be served by staying CompTel's action until the Commission ruled on AT&T's administrative appeal. Accordingly, SBC's application for review is now before us.

5. SBC seeks review of the Bureau's denial in part of its request for confidential treatment. SBC challenges the Bureau's conclusion that FOIA Exemption 7(C) does not apply to corporations, contending that corporations are persons that have a privacy interest within the meaning of Exemption 7(C), and that this proposi-

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[17] *CompTel v. FCC*, Civil Action 06-01718 (HHK) (D.D.C. filed Oct. 5, 2006). The FOIA permits such actions where the agency does not act on a FOIA request or appeal within the statutory time period. *See* 5 U.S.C. § 552(a)(6)(C)(i) (agency's failure to comply with statutory time period deemed to exhaust administrative remedies). Because the CompTel's judicial action is still pending, we will not address the merits of its application for review here.

[18] *See* note 1, *supra*.

[19] *CompTel v. FCC*, Civil Action 06-01718 (HHK) (D.D.C. memorandum opinion and order Mar. 5, 2008).

[20] *See generally Chrysler Corp. v. Brown*, 441 U.S. 281 (1979) (discussing reverse FOIA requests).

tion is consistent with precedent.[21] Accordingly, SBC argues that its internal documents should be withheld pursuant to Exemption 7(C), because disclosure would embarrass SBC without serving any public policy interest.[22] CompTel responds that there is no precedent supporting the proposition that corporations have a personal privacy interest for purposes of Exemption 7(C).[23]

II. DISCUSSION

A. Procedural Matter

6. As an initial matter, we find that SBC's application for review does not conform with the Commission's Rules. In general, an application for review of an initial action on a request for inspection may be filed only by the person making the FOIA request (here CompTel).[24] There is an exception to this limitation where a request for inspection of records submitted to the Commission in confidence under section 0.457(d) or section 0.459 is granted or partially granted, in which case the person who submitted the records or the third party owner of the records may file an application for review.[25] However, despite notice from EB of its right to do so,[26] SBC

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[21] SBC Application for Review at 2-8.

[22] *Id.* at 4-5.

[23] Letter from Mary C. Albert, Vice President, Regulatory Policy to Samuel Feder, Esq.,, [then] Acting General Counsel (Sept. 1, 2005) (*CompTel Opposition*) at 3-6.

[24] 47 C.F.R. § 0.461(j).

[25] 47 C.F.R. § 0.461(i)(1) and (2), *citing* 47 C.F.R. §§ 0.457(d) and 0.459.

[26] EB's letter of inquiry specifically advised SBC: "If the Company [SBC] requests that any information or Documents, as defined herein, responsive to this letter be treated in a confidential manner, it shall

did not seek confidential treatment of its submissions in accordance with section 0.459(a) by filing a timely request for confidentiality when it submitted the material, and thus does not qualify to file an application for review pursuant to the terms of section 0.461(i).[27] This failure to comply with our rules would alone justify the denial of SBC's request for confidential treatment. Although we admonish SBC that it should have complied with section 0.459, we are mindful of the provisions of FOIA Exemption 4 and the Trade Secrets Act[28] to prevent disclosure of confidential information and to consider the views of the submitter when making disclosure determinations. Therefore, we have considered the information and arguments subsequently submitted by SBC on our own motion.

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submit, along with responsive information and Documents, a statement in accordance with section 0.459 of the Commission's rules." Letter from Hillary S. DeNigro, Deputy Chief, Investigations and Hearing Division, EB to Michelle A. Thomas and Christopher Heimann [SBC] (Aug. 24, 2004) at 1-2.

[27] SBC's response to CompTel's FOIA request states: "All of the records responsive to the CompTel/ALTS [FOIA] request were issued and obtained by the Commission as part of an Enforcement Bureau investigation, and thus, pursuant to 0.457, are not routinely available for public inspection." Letter from Jim Lamoureux to Judy Lancaster (May 27, 2005). SBC thus implies that it was not required to comply with section 0.459. We disagree. Because the material submitted by SBC was not specifically listed as confidential commercial and financial information under section 0.457(d)(l), section 0.457(d)(2) required SBC to submit a request for confidentiality under section 0.459. Section 0.461(i) does not permit a party submitting confidential documents to the Commission to wait to claim confidentiality, as SBC did, until a FOIA request is filed.

[28] 18 U.S.C. § 1905.

B. Exemption 7(C)

7. We disagree with SBC's contention that we should withhold all of the documents that it submitted in response to EB's letter of inquiry under Exemption 7(C).[29] SBC argues that disclosure of these records, all indisputably "compiled for law enforcement purposes," could reasonably be expected to "constitute an unwarranted invasion of personal privacy."[30] In this regard, SBC characterizes itself as a "private corporate citizen" with personal privacy rights that should be protected from disclosure that would "embarrass" it.[31] However, SBC's position that a corporation has "personal privacy" interests within the meaning of Exemption 7(C) is at odds with established Commission and judicial precedent. In *Chadmoore Communications, Inc.*,[32] the Commission held that information regarding an individual acting in the capacity of a commercial licensee, that is, in a business capacity, did not implicate a privacy interest for purposes of Exemption 7(C). The clear implication of *Chadmoore* is that information regarding a corporation would not be exempt either.[33] Our holding is

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[29] FOIA Exemption 7(C) applies to "records or information compiled for law enforcement purposes . . . to the extent that production of such law enforcement records or information . . . could reasonably expected to constitute an unwarranted invasion of personal privacy."

[30] *See* 5 U.S.C. § 552(b)(7)(C).

[31] *SBC Application for Review* at 4.

[32] 13 FCC Rcd 23943, 23946-47 ¶ 7 (1998).

[33] *Chadmoore* references a line of cases holding that corporations do not have a "personal privacy" interest for purposes of Exemption 6. *See* 13 FCC Rcd at 23946-47 ¶ 7 and *Electronic Privacy Information Center v. Dep't of Homeland Security*, 384 F. Supp. 2d 100, 118 n.29 (D.D.C. 2005); *Hill v. Dep't of Agriculture*, 77 F. Supp. 2d 6, 7 (D.D.C. 1999); *Ivanhoe Citrus Ass'n v. Handley*, 612 F. Supp. 1560, 1567

consistent with judicial decisions in *Washington Post Co. v. U.S. Dep't of Justice*[34] and *Cohen v. EPA*.[35] In *Washington Post*, the United States Court of Appeals for the District of Columbia Circuit stated that the disclosures with which Exemption 7(C) is concerned are those of "an intimate personal nature" such as "marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, and reputation."[36] In *Cohen*, the United States District Court for the District of Columbia cited the same examples.[37] These cases hold that Exemption 7(C) does not cover information relating to business judgments and relationships, even if disclosure might tarnish someone's professional reputation.[38] Thus, in *Washington Post*, the D.C. Circuit held that

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(D.D.C. 1985). "While it has been established that Exemption 7(C) and Exemption 6 are not completely congruent, the difference lies in the standard of review and not the relevant privacy interest covered by the exemption." *Cohen v. EPA*, 575 F. Supp. 425, 429 n.6 (D.D.C. 1983), *citing FBI v. Abramson*, 456 U.S. 615, 630 n.13 (1982) (Exemption 6 protects against the disclosure of information that would constitute a "clearly unwarranted" invasion of personal privacy, whereas Exemption 7(C) does not require the harm to privacy to be "clearly unwarranted"); *see also U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 756 (1989) (noting the same distinction and that Exemption 6 uses the word "would" while Exemption 7(C) uses "could reasonably").

[34] 863 F.2d 96, 100-01 (D.C. Cir. 1988).

[35] 575 F. Supp. 425, 429-30 (D.D.C. 1983).

[36] 863 F.2d at 100.

[37] 575 F. Supp. at 429.

[38] 863 F.2d at 100 ("Information relating to business judgments and relationships does not qualify for exemption [7(C)]"); 575 F.2d at 429 ("The privacy exemption [in Exemption 7(C)] does not apply to information regarding professional or business activities").

Exemption 7(C) did not cover the report of an internal corporate investigation that mentioned individual employees by name but did not identify them as being personally the target of the investigation.[39] In *Cohen*, the district court held that Exemption 7(C) did not cover the names of individuals, such as corporate officials, mentioned in EPA hazardous waste notices, since they were identified only in their "public role" of being the users of hazardous waste disposal sites and would no more be subject to harassment than if the name of the corporation were disclosed.[40] Like *Chadmoore*, these cases imply that Exemption 7(C) does not cover a corporation's "privacy interest," since a corporation's interests are of necessity business interests. SBC points to no Exemption 7(C) cases that are to the contrary.

8. SBC urges us to depart from this precedent on several grounds, none of which are persuasive. Unlike SBC, we do not believe that protecting a corporation from "embarrassment" falls within the purposes of Ex-

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[39] The D.C. Circuit, in *McCutcheon v. U.S. Dep't of Health and Human Services*, 30 F.3d 183, 187 (D.C. Cir. 1994), clarified that, although the exemption does not generally cover business judgments and relationships, information that accused individual employees of having a committed a crime in connection with their employment would implicate "the privacy interest of personal honor" and that "the protection accorded reputation under Exemption 7(C) would generally shield material" that "would show that an individual was the target of a law enforcement investigation." As noted, however, the internal corporate report in *Washington Post* did not identify any individual employees as being the targets of investigation and no such information is at issue in the present case.

[40] To the extent that the notices identified individuals as being potentially responsible for hazardous waste violations, the court held that the public interest outweighed the individuals' privacy interests.

emption 7(C), as interpreted by the courts.[41] Judicial discussion of the purposes of Exemption 7(C) focus on the kinds of tangible personal impact that disclosure of information of an intimate personal nature might have on the targets of investigations, witnesses, and participating law enforcement officials, such as damage to their personal reputation, embarrassment, and the possibility of harassment.[42] We read the courts' discussion in these cases to refer to the literal embarrassment and danger that an individual might suffer from disclosure of information of a personal nature and not to the more abstract impact that disclosure might have on a legal entity like a corporation.

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[41] We have previously held that public embarrassment to a corporation did not warrant withholding material under Exemption 4. *Liberty Cable Co., Inc.*, 11 FCC Rcd 2475, 2476 ¶ 7 (1996), *aff'd sub nom. Bartholdi Cable Co., Inc. v. FCC*, 114 F.3d 274 (D.C. Cir. 1997), *citing CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1154 (D.C. Cir. 1987) *and General Electric Co. v. Nuclear Regulatory Comm'n*, 750 F.2d 1394, 1402 (7th Cir. 1984).

[42] *See, e.g., Washington Post*, 863 F.2d at 100-01; *Nation Magazine v. U.S. Customs Service*, 71 F.3d 885, 894 (D.C. Cir. 1995) (" . . . individuals have an obvious privacy interest . . . in keeping secret the fact that they were subjects of a law enforcement investigation," as do witnesses and informants); *Wichlacz v. U.S. Dep't of Interior*, 938 F. Supp. 325, 333 (E.D. Va. 1996) ("Law enforcement officers, interviewees, suspects, witnesses, and other individuals named in investigatory files all have substantial privacy interests" because revelation could result in "embarrassment or harassment"). SBC notes that in *Alexander & Alexander Services, Inc. v. SEC*, 1993 WL 439799 (D.D.C. 1993) at * 10, the district court held that Exemption 7(C) applies when "a private citizen seeks information regarding another private citizen *or corporation*. . . . " SBC Application for Review at 8. [Emphasis added.] However, that case, like *Washington Post*, concerned the personal privacy of individuals named in corporate documents, not the privacy of the corporation itself.

9. SBC also argues that in *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press,*[43] the United States Supreme Court did not limit the applicability of Exemption 7(C) to individuals.[44] This argument is inapposite because *Reporters Committee* involved a rap sheet unique to a particular individual and the Court had no reason to address the applicability of its holding to corporations. Nonetheless, to the extent that *Reporters Committee* is at all relevant, it is fully consistent with EB's determination that Exemption 7(C) applies only to individuals' privacy interests. In analyzing the intent of Congress with respect to Exemption 7(C), *Reporters Committee* relies on both the Privacy Act[45] and FOIA Exemption 6, both of which apply only to individuals,[46] suggesting that the privacy interest involved in all three provisions is similar and applicable only to individuals.

10. SBC's remaining arguments amount to the assertion that because a corporation may be treated as a "person"[47] and have "privacy interests" for some pur-

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[43] 489 U.S. 749 (1989).

[44] *SBC Application for Review* at 4.

[45] 5 U.S.C. § 552a.

[46] *See Reporters Committee for Freedom of the Press*, 489 U.S. at 766-68. SBC admits that Exemption 6 applies only to individuals. *SBC Application for Review* at 6. The Privacy Act provides on its face that it applies only to individuals. *See* 5 U.S.C. § 552a (titled "Records maintained on individuals"). *Reporters Committee* effectively rebuts SBC's argument that EB erred in equating the protection afforded by Exemptions 6 and 7(C). *SBC Application for Review* at 6. *See also* note 36, *supuu.*

[47] A corporation is defined as a "person" under the Administrative Procedure Act (APA), of which the FOIA is a part. *See* 5 U.S.C. § 551(2). Thus, a corporation falls within the scope of FOIA Exemption

poses, it has personal privacy interests for purposes of Exemption 7(C). Such reasoning cuts too broadly. The privacy interests relevant to Exemption 7(C) are those discussed in paragraphs 8 and 9, *supra*. The interests underlying other forms of "privacy" that might be relevant in other contexts are not controlling for purposes of Exemption 7(C).[48] Thus, for example, it is not relevant that a corporation may have a constitutionally protected privacy interest against unreasonable search and seizure of its property under the Fourth Amendment, as found in *U.S. v. Hubbard*,[49] cited by SBC. SBC has not demonstrated that the holding in *Hubbard* compels or even supports a finding that a corporation has any personal privacy interest that justifies withholding of documents under the FOIA.[50] Likewise, the privacy inter-

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4, which speaks of commercial and financial records obtained from a person. *See Lakin Law Firm, P.C.*, 19 FCC Rcd 12727, 12729 n.24 (2004), *citing Nadler v. FDIC*, 92 F.3d 93, 95 (2d Cir. 1996). The APA does not, however, define "personal" or "personal privacy." It is therefore irrelevant, for example, whether FOIA Exemption 7(B), which applies to records or information that "would deprive a person of a right to a fair trial or an impartial adjudication," applies to corporations, as SBC contends. SBC Application for Review at 6. A corporation's right to a fair trial is not based on any personal privacy interest.

[48] *See Reporters Committee*, 489 U.S. at 762 n.13 ("The question of the statutory meaning of privacy under the FOIA is, of course, not the same as the question whether a tort action might lie for invasion of privacy or the question whether an individual's interest in privacy is protected by the Constitution."), *citing Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (Constitution prohibits State from penalizing publication of name of deceased rape victim obtained from public records).

[49] 650 F.2d 293, 306 (D.C. Cir. 1980), *cited in SBC Application for Review* at 6.

[50] *In Hubbard*, the government seized documents from non-public areas of the premises of the Church of Scientology. Subsequently, the Church proffered the documents in support of a motion asserting that

ests found in *Tavoulareas v. Washington Post Co.*,[51] and cited by SBC, involved the "constitutionally protected privacy interest in avoiding the public disclosure of sensitive commercial information [obtained in civil discovery and not used at a trial between private parties]."[52] It had nothing to do with FOIA Exemption 7.[53] The constitutional privacy analysis applied by the panel in *Tavoulareas* was, in any case, vacated on rehearing by the court *en banc*.[54]

11. For all of the reasons discussed above, we find that Exemption 7(C) has no applicability to corporations such as SBC. Accordingly, we deny SBC's application for review.

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the seizure was unconstitutional. The appellate court reversed the trial judge's order unsealing the documents. It held that the "single most important element" in its decision to protect the documents was that they had been put in the record solely to support a motion to demonstrate the unlawfulness of the seizure and that it would undermine the Fourth Amendment for the documents to be disclosed under those circumstances. The fact that a corporation may have an interest in protecting itself from the unlawful seizure of its property does not imply that it has the distinctly different "personal privacy" interest relevant to Exemption 7(C).

[51] 724 F.2d 1010, 1018 (D.C. Cir. 1984), *reh. granted en banc and vacated*, 737 F.2d 1170 (D.C. Cir. 1984), *cited in SBC Application for Review* at 5. The court *en banc* directed the District Court to apply a discretionary "good cause" analysis under Rule 26(c) of the Federal Rules of Civil Procedure, which relates to protective orders.

[52] 724 F.2d at 1023.

[53] The privacy interest protected in *Tavoulareas* seems somewhat similar to the interest protected by FOIA Exemption 4, which applies to corporations as well as individuals. 5 U.S.C. § 552(b)(4) ("trade secrets and commercial or financial information obtained from a person and privileged or confidential").

[54] *See supra* note 51.

III. ORDERING CLAUSE

12. ACCORDINGLY, IT IS ORDERED that SBC Communications Inc.'s application for review IS DENIED. If SBC does not seek a judicial stay within ten (10) working days of the date of release of this memorandum opinion and order, the redacted records will be produced to CompTel, as specified in the Enforcement Bureau's decision. *See* 47 C.F.R. § 0.461(i)(4).

FEDERAL COMMUNICATIONS
COMMISSION

Marlene H. Dortch
Secretary

APPENDIX C

[SEAL OMITTED]

FEDERAL COMMUNICATIONS COMMISSION
Enforcement Bureau, Investigations and Hearings Division
445 12th Street, S.W., Room 4-C320
Washington, D.C. 20554

Aug. 5, 2005

Via Certified Mail, Return Receipt Requested, Facsimile and E-Mail

Mr. Jim Lamoureux
SBC Services, Inc.
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Ms. Mary C. Albert
Vice President, Regulatory Policy
CompTel/ALTS
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Re: Freedom of Information Act Request
FOIA Control No. 2005-333

Dear Mr. Lamoureux and Ms. Albert:

I. INTRODUCTION

This letter concerns a Freedom of Information Act ("FOIA") request from Comptel/ALTS ("Comptel") for information submitted by SBC Communications, Inc. ("SBC") in response to a Letter of Inquiry ("LOI") from the Enforcement Bureau. SBC has requested confidential treatment of its submissions. As explained below, we grant SBC's request in part and deny it in part. Therefore, we will release to Comptel SBC's responses as described herein unless we receive an application for review from SBC within ten working days from the date of this letter. If Comptel believes that any portion of this decision is in error, it may file an application for review of this action with the Commission's Office of General Counsel within 30 days of the date of this letter.

II. BACKGROUND

On August 24, 2004, the Investigations and Hearings Division of the Enforcement Bureau (the "Bureau") sent SBC an LOI notifying the company that the Bureau was investigating whether it violated Part 54, Subpart F, of the Commission's rules, 47 C.F.R. §§ 54.500-54.521, and the Commission's orders regarding universal service funding.[1] SBC responded to this LOI on September 13, 2004.[2]

On December 16, 2004, the Bureau terminated its investigation by adopting a Consent Decree in which SBC agreed to make a voluntary contribution to the United States Treasury in the amount of $500,000 and to institute a compliance plan, as specified therein, "to ensure SBC's wholly-owned subsidiaries' future compliance with the Commission's rules governing the E-Rate program."[3] The Consent Decree specifies that "it does not constitute an admission, denial, adjudication on the merits, or a factual or legal determination regarding any compliance or noncompliance with the requirements of section 254 of the Act or Part 54 of the Commission's rules.[4]

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[1] Letter to Michelle A. Thomas, Executive Director, Federal Regulatory, SBC Communications, Inc., and Christopher Heimann, General Attorney, SBC Telecommunications Inc. from Hillary S. DeNigro, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated August 24, 2004 (" LOI").

[2] Letter to David Janas, Special Counsel, Investigations and Hearings Division, Enforcement Bureau from Christopher Heimann, General Attorney, SBC Telecommunications Inc., dated September 13, 2004 ("LOI Response").

On April 4, 2005, the Bureau received Comptel's FOIA request for copies of "all pleadings and correspondence contained in file number EB-04-IH-0342,"[5] the investigative file for the investigation referenced in the December 16, 2004, Consent Decree. On May 27, 2005, SBC filed its response to the FOIA request, opposing release of the requested documents and seeking confidentiality for the materials.[6] SBC argues in its Opposition that the requested documents were "compiled for law enforcement purposes," and, thus, are exempt from disclosure under FOIA Exemption 7. Specifically SBC argues that disclosure is prohibited by FOIA Exemption 7(C) because it would cause an unwarranted invasion of personal privacy. SBC also contends that FOIA Exemption 4 prohibits release of the requested documents because the documents "clearly pertain to SBC's business dealings with one of its customers" and because many of the documents contain information pertaining to SBC's systems, processes and operations, and include cost, pricing and other "commercially sensitive" information.[7]

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[3] *SBC Communications Inc.*, Order and Consent Decree, 19 FCC Rcd 24014 (Enf. Bur. 2004).

[4] *Id.* at 24019, ¶ 13.

[5] *See* Electronic FOIA (E-FOIA) request form from Mary C. Albert ("Requester"), Comptel / ALTS, dated April 4, 2005 ("FOIA 2005-333"). In a telephone conversation with IHD staff on April 12, 2005, the Requester modified and clarified her FOIA request to seek only pleadings filed by SBC and correspondence between SBC and the Commission.

[6] *See* Letter from Jim Lamoureux, Senior Counsel, SBC Services, Inc., to Judy Lancaster, Investigations and Hearings Division, Enforcement Bureau, dated May 27, 2005 ("Opposition").

By letter dated June 28, 2005, Comptel replied to SBC's Opposition.[8] Comptel challenges SBC's claims that FOIA Exemptions 7(C) and 4 prohibit disclosure of the requested documents. Although Comptel does not object to redaction from the requested documents of the names, telephone numbers, and home and email addresses of SBC employees, it argues that Exemption 7(C) is inapplicable to SBC because it is "a large, publicly traded corporation . . . that . . . possesses no protectable personal privacy interest."[9] Comptel also asserts that SBC's "conflicting positions" regarding whether its submissions were provided to the Bureau voluntarily or under compulsion do not support SBC's reliance upon Exemption 4 to prohibit disclosure of the requested documents, that SBC's "conclusory and generalized" characterizations of the records as confidential commercial information are "insufficient to demonstrate the likelihood of substantial competitive injury" as required by Exemption 4, and that the cost and pricing information that SBC wishes to withhold from disclosure is already in the public domain because E-Rate service providers are required under section 54.501(d)(3) of the

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[7] Opposition at 6.

[8] Letter from Mary C. Albert, Vice President Regulatory Policy, CompTel/Ascent/ALTS to Judy Lancaster, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated June 28, 2005 ("Reply").

[9] *Id.* at 2.

Commission's rules[10] to make those records available for public inspection.[11]

III. DISCUSSION

A. SBC's Requests To Keep Its Responses Confidential In Their Entirety Are Deficient

Section 0.459 of the Commission's rules establishes a procedure by which parties may request that information or materials that they have submitted to the Commission not be made routinely available for public inspection. *See* 47 C.F.R. § 0.459. This rule requires that a party seeking confidentiality provide a statement of the reasons for withholding the materials in question from public inspection and set forth specific categories of materials for which such treatment is appropriate. A request for confidentiality "shall include," *inter alia,* an "explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged;"[12] an "[e]xplanation of how disclosure of the information could result in substantial competitive harm;"[13] and "[i]dentification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties."[14]

We find that SBC's requests for confidential treatment of its submissions substantially fail to comply with the standards set forth in section 0.459(b) of the Commission's rules. The rules clearly state that casual requests for confidentiality that do not comply with the requirements set forth in sections 0.459(a) and (b) will not be considered.[15] Further, the LOI issued to SBC by the Bureau explicitly warns SBC that requests for confidential treatment must comply with the requirements specifically mandated by section 0.459(b), and that the Bureau will not consider confidentiality requests that do not so comply.

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[10] 47 C.F.R. § 54.501(d)(3).

[11] Reply at 3.

[12] *See* 47 C.F.R. § 0.459(b)(3).

[13] See 47 C.F.R. § 0.459(b)(5).

[14] See 47 C.F.R. § 0.459(b)(7).

Nevertheless, SBC has failed to provide a statement of specific reasons for withholding its responses in their entirety. While generally categorizing the information contained in its submissions, SBC does not, as required by section 0.459(b)(3), explain the degree to which specific information is commercial or financial or contains a trade secret. Nor does it explain, as required by section 0.459(b)(5), how disclosure of such information could result in substantial competitive harm. SBC also fails to state whether any of the information for which it seeks protection is already available to the public.[16]

We find SBC's request for the confidential treatment of all its submissions to be overly broad. Portions of the documents submitted by SBC appear to contain commercial or financial information, the disclosure of which could result in substantial competitive harm to SBC. But most of those pages also contain information that is not confidential, such as FRN numbers, lists of equipment, and references to ordinary administrative matters. Some of that information is already within the public domain.[17] Release of such information appears unlikely to result in competitive harm to SBC and SBC offers no justification for withholding such information as commercial, financial or trade secret information. Consequently, that information will be disclosed.

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[15] *See* 47 C.F.R. § 0.459(c).

[16] *See* 47 C.F.R. § 0.459(b)(7).

[17] Federal Registration Numbers ("FRN"s), including those of SBC, are available to the public on the Commission Registration System

Accordingly, we conclude that SBC has failed to demonstrate by a preponderance of the evidence a case for nondisclosure of all of its submissions. We therefore deny SBC's requests that we grant confidential treatment of the entirety of its submissions.

B. Portions of SBC's Submissions Are Subject To Protection From Disclosure As "Commercially Sensitive Information"

We base confidentiality determinations under section 0.459 of the Commission's rules relating to commercial or financial materials on Exemption 4 of the FOIA which permits us to withhold "trade secrets and commercial or financial information obtained from a person and [that is] privileged or confidential."[18] Exemption 4 protects "any financial or commercial information provided to the Government on a *voluntary* basis if it is of a kind that the provider would not customarily release to the public." (emphasis added)[19] However, under Exemption 4 commercial or financial materials that are part of *required* submissions are held to be confidential only when disclosure would either impair the government's ability to obtain necessary information in the future or would

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("CORES") database which is located on the Commission's internet web page. *See also* 47 C.F.R. 54.501(d)(3).

[18] 5 U.S.C. § 552(b)(4).

[19] *See Critical Mass Energy Project v. NRC*, 975 F.2d 87 1,880 (D.C. Cir. 1992) *("Critical Mass")*.

be likely to substantially harm the competitive position of the submitter.[20]

SBC's LOI responses were *required* submissions for the purposes of our FOIA analysis.[21] An LOI is an administrative order that compels the production of information. Failure to respond properly to an LOI may subject an entity to forfeiture action.[22] Because we directed SBC to submit its written responses to the Bureau's LOI, its responses were required.

We find that certain information in SBC's submissions constitutes commercial or financial information, the disclosure of which could result in substantial competitive harm to SBC. Such commercially sensitive information includes, but is not limited to, SBC's costs and pricing data, its billing and payment dates, and identifying information of SBC's staff, contractors, and the representatives of its contractors and customers. Accordingly, such information is exempt from disclosure under FOIA Exemption 4.[23]

Although section 54.501(d)(3) of the Commission's rules requires telecommunications service providers such as SBC to allow public inspections of the rates it charges and the discounts it allows to schools and libraries eligible for universal service support,[24] SBC can comply with the rule's requirements by maintaining a "public inspection file" containing the required rate information. The rule does not mandate disclosure here of all of the pricing data contained in SBC's submissions. In this instance, disclosure of SBC's invoice and discount amounts could disclose the total value of its contract, information that would not otherwise be publicly available. That information is not in the public domain and its release is not required by the rule. Because release of SBC pricing information in this case is likely to substantially harm SBC's competitive position, such information is exempt from disclosure under FOIA Exemption 4.

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[20] *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) *("National Parks"); Critical Mass*, 795 F.2d at 878 (citing *National Parks)*.

[21] *See Critical Mass* (establishing separate tests for confidential treatment of voluntary submissions and required submissions). See also

[22] *See SBC Communications, Inc.*, Order of Forfeiture, 17 FCC Rcd 7589 (2002) (forfeiture paid); *Globcom Inc.*, Notice of Apparent Liability for Forfeiture and Order, 18 FCC Rcd 19893, n.36 (2003), *response pending*.

[23] *See, e.g., In Re The Lakin Law Firm, P.C.*, Memorandum Opinion and Order, 19 FCC Rcd 12727 (2004).

C. Names of SBC Employees And Customers Are Protected From Disclosure Due To Personal Privacy Concerns

The FOIA statute, 47 [*sic*] U.S.C. § 552(b)(7)(C), provides that records or information compiled for law enforcement purposes are exempt from disclosure to the extent that the production of such records could reasonably be expected to "constitute an unwarranted invasion of personal privacy" are exempt from disclosure.[25] Generally, businesses do not possess "personal privacy" interests as required for application of FOIA Exemption 7(C).[26] However, the individuals identified in SBC's submissions do have such privacy rights and, pursuant to this provision, portions of SBC's submissions will be redacted to withhold the names and identifying information of those individuals to prevent unwarranted invasions of their personal privacy.

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[24] 47 C.F.R. § 54.501(d)(3) provides that "[Telecommunications] Service providers shall keep and retain records of rates charged to and discounts allowed for eligible schools and libraries—on their own or as part of a consortium. Such records shall be available for public inspection."

[25] 5 U.S.C. § 552(b)(7)(C). *See also* 5 U.S.C. § 552(b)(6); *In re William McConnell, Broadcasting and Cable*, Order, 18 FCC Rcd 26371 (2003).

D. Documents Which Disclose an Agency's Deliberative Process Are Protected Prom Disclosure

Exemption 5 of the FOIA protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.[27] Pursuant to this exemption we will withhold from public disclosure drafts of Bureau pleadings and correspondence, and memoranda and emails, distributed among Commission staff, which discuss the issues and investigation related to this matter.

IV. CONCLUSION

For the reasons stated above, we grant in part and deny in part SBC's request for confidentiality. If SBC believes that this decision is in error, it must file an application for review of this action with the Commission's Office of General Counsel within ten working days of the date of this letter. *See* 47 C.F.R. § 0.461(i). We will produce the documents requested as noted above if no such application for review is filed. We will assess copying charges, if any, at that time. If Comptel believes that this decision is in error, it may file an application for review of this action with the Commission's Office of

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[26] *See, e.g., Chadmore Communications, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 23943 (1998)

[27] 5 U.S.C. § 552(b)(5).

General Counsel within 30 days of the date of this letter. *See* 47 C.F.R. § 0.461(j).

We are providing SBC's counsel with a copy of the documents as redacted pursuant to this decision.

Sincerely,

/s/ WILLIAM H. DAVENPORT
WILLIAM H. DAVENPORT
CHIEF, INVESTIGATIONS AND
HEARINGS DIVISION
ENFORCEMENT BUREAU

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-4024

AT&T INC, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA, RESPONDENT

COMPTEL, INTERVENOR

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge, MCKEE, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, and HARDIMAN, Circuit Judges

The petition for rehearing filed by respondent in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ MICHAEL A. CHAGARES
MICHAEL A. CHAGARES
Circuit Judge

DATED: November 23, 2009

APPENDIX E

1. 5 U.S.C. 551, provides in pertinent part:

Definitions

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

* * * * *

2. The Freedom of Information Act, 5 U.S.C. 552,[1] provides in pertinent part:

Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

* * * * *

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

* * * * *

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947

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[1] As amended by the OPEN FOIA Act of 2009, Pub. L. No. 111-83, § 564(b), 123 Stat. 2184 (amending 5 U.S.C. 552(b)(3)), and the OPEN Government Act of 2007, Pub. L. No. 110-175, § 9, 121 Stat. 2528 (amending 5 U.S.C. 552(f)(2)).

(50 U.S.C. 401a(4))) shall not make any record available under this paragraph to—

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

* * * * *

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—

(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

* * * * *

(f) For purposes of this section, the term—

(1) "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) "record" and any other term used in this section in reference to information includes—

(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and

(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

* * * * *

3. 47 C.F.R. 0.457 provides in pertinent part:

Records not routinely available for public inspection.

The records listed in this section are not routinely available for public inspection pursuant to 5 U.S.C. 552(b). The records are listed in this section by category, according to the statutory basis for withholding those records from inspection; under each category, if appropriate, the underlying policy considerations affecting the withholding and disclosure of records in that category are briefly outlined. Except where the records are not the property of the Commission or where the disclosure of those records is prohibited by law, the Commission will entertain requests from members of the public under § 0.461 for permission to inspect particular records withheld from inspection under the provisions of this section, and will weigh the policy considerations favoring non-disclosure against the reasons cited for permitting inspection in the light of the facts of the particular case. In making such requests, there may be more than one basis for withholding particular records from inspection. The listing of records by category is not intended to imply the contrary but is solely for the information and assistance of persons making such requests. Requests to inspect or copy the transcripts, recordings or minutes of closed agency meetings will be considered under § 0.607 rather than under the provisions of this section.

(a) *Materials that are specifically authorized under criteria established by Executive Order (E.O.) to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order, 5 U.S.C. 552(b)(1).* * * * *

(b) *Materials that are related solely to the internal personnel rules and practices of the Commission, 5 U.S.C. 552(b)(2).* * * * *

(c) *Materials that are specifically exempted from disclosure by statute (other than the Government in the Sunshine Act, 5 U.S.C. 552b, provided that such statute either requires that the materials be withheld from the public in such a manner as to leave no discretion on the issue, or establishes particular criteria for withholding or refers to particular types of materials to be withheld).* * * * *

(d) *Trade secrets and commercial or financial information obtained from any person and privileged or confidential—categories of materials not routinely available for public inspection, 5 U.S.C. 552(b)(4) and 18 U.S.C. 1905.*

(1) The materials listed in this paragraph have been accepted, or are being accepted, by the Commission on a confidential basis pursuant to 5 U.S.C. 552(b)(4). To the extent indicated in each case, the materials are not routinely available for public inspection. If the protection afforded is sufficient, it is unnecessary for persons submitting such materials to submit therewith a request for non-disclosure pursuant to § 0.459. A persuasive showing as to the reasons for inspection will be required in requests submitted under § 0.461 for inspection of such materials.

(i) Financial reports submitted by radio or television licensees.

(ii) Applications for equipment authorizations (type acceptance, type approval, certification, or advance approval of subscription television systems), and materials relating to such applications, are not routinely available for public inspection prior to the effective date of the authorization. The effective date of the authorization will, upon request, be deferred to a date no earlier than that specified by the applicant. Following the effective date of the authorization, the application and related materials (including technical specifications and test measurements) will be made available for inspection upon request (see § 0.460). Portions of applications for equipment certification of scanning receivers and related materials will not be made available for inspection.

(iii) Information submitted in connection with audits, investigations and examination of records pursuant to 47 U.S.C. 220.

(iv) Programming contracts between programmers and multichannel video programming distributors.

(v) The rates, terms and conditions in any agreement between a U.S. carrier and a foreign carrier that govern the settlement of U.S. international traffic, including the method for allocating return traffic, if the U.S. international route is exempt from the international settlements policy under § 43.51(e)(3) of this chapter.

(vi) Outage reports filed under Part 4 of this chapter.

(vii) The following records, relating to coordination of satellite systems pursuant to procedures codified in the International Telecommunication Union (ITU) Radio Regulations:

* * * * *

(2) Unless the materials to be submitted are listed in paragraph (d)(1) of this section and the protection thereby afforded is adequate, any person who submits materials which he or she wishes withheld from public inspection under 5 U.S.C. 552(b)(4) must submit a request for non-disclosure pursuant to § 0.459. If it is shown in the request that the materials contain trade secrets or privileged or confidential commercial, financial or technical data, the materials will not be made routinely available for inspection; and a persuasive showing as to the reasons for inspection will be required in requests for inspection submitted under § 0.461. In the absence of a request for non-disclosure, the Commission may, in the unusual instance, determine on its own motion that the materials should not be routinely available for public inspection.

(e) *Interagency and intra-agency memoranda or letters, 5 U.S.C. 552(b)(5).* * * * *

(f) *Personnel, medical and other files whose disclosure would constitute a clearly unwarranted invasion of personal privacy, 5 U.S.C. 552(b)(6).* * * * *

(g) *Under 5 U.S.C. 552(b)(7), records compiled for law enforcement purposes, to the extent that production of such records:*

(1) Could reasonably be expected to interfere with enforcement proceedings;

(2) Would deprive a person of a right to fair trial or an impartial adjudication;

(3) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(4) Could reasonably be expected to disclose the identity of a confidential source;

(5) Would disclose investigative techniques or procedures or would disclose investigative guidelines if such disclosure could reasonably be expected to risk circumvention of the law; or

(6) Could reasonably be expected to endanger the life or physical safety of any individual.

4. 47 C.F.R. 0.461 provides in pertinent part:

Requests for inspection of materials not routinely available for public inspection.

Any person desiring to inspect Commission records that are not listed in § 0.453 or § 0.455 shall file a request for inspection meeting the requirements of this section. The FOIA Public Liaison is available to assist persons seeking records under this section. See § 0.441(a).

(a)(1) Records include:

* * * * *

(b)(1) Requests shall be captioned "Freedom of Information Act Request," shall be dated, shall list the telephone number (if any), street address, and e-mail address (if any) of the person making the request, and should reasonably describe, for each document requested (see § 0.461(a)(1)), all information known to the person making the request that would be helpful in identifying and locating the document.

* * * * *

(c) If the records are of the kinds listed in § 0.457 or if they have been withheld from inspection under § 0.459, the request shall, in addition, contain a statement of the reasons for inspection and the facts in support thereof. In the case of other materials, no such statement need accompany the request, but the custodian of the records may require the submission of such a statement if he or she determines that the materials in question may lawfully be withheld from inspection.

(d)(1) Requests shall be

(i) Delivered or mailed to the Managing Director, FCC, 445—12th Street, SW., Room 1-A836, Washington, DC 20554;

(ii) Sent by e-mail to *foia@fcc.gov*;

(iii) Filed electronically though the Internet at *http://www.fcc.gov/foia/#reqform*; or

(iv) Sent by facsimile to (202) 418-2826 or (202) 418-0521. If the request is filed by mail or facsimile, an original and two copies of the request shall be submitted. If the request is enclosed in an envelope, the envelope shall be marked, "Freedom of Information Act Request."

(2) For purposes of this section, the custodian of the records is the Chief of the Bureau or Office where the records are located. The Chief of the Bureau or Office

may designate an appropriate person to act on a FOIA request.

(3) If the request is for materials submitted to the Commission by third parties and not open to routine public inspection under § 0.457(d), § 0.459, or another Commission rule or order, or if a request for confidentiality is pending pursuant to § 0.459, or if the custodian of records has reason to believe that the information may contain confidential commercial information, one copy of the request will be provided by the custodian of the records (see § 0.461(e)) to the person who originally submitted the materials to the Commission. If there are many persons who originally submitted the records and are entitled to notice under this paragraph, the custodian of records may use a public notice to notify the submitters of the request for inspection. The submitter or submitters will be given ten calendar days to respond to the FOIA request. See § 0.459(d)(1). If a submitter has any objection to disclosure, he or she is required to submit a detailed written statement specifying all grounds for withholding any portion of the information (see § 0.459). This response shall be served on the party seeking to inspect the records. The requester may submit a reply within ten business days unless a different period is specified by the custodian of records. The reply shall be served on all parties that filed a response. In the event that a submitter fails to respond within the time specified, the submitter will be considered to have no objection to disclosure of the information.

* * * * *

(f) Requests for inspection of records will be acted on as follows by the custodian of the records.

(1) If the Commission is prohibited from disclosing the records in question, the request for inspection will be denied with a statement setting forth the specific grounds for denial.

(2)(i) If records in the possession of the Commission are the property of another agency, the request will be referred to that agency and the person who submitted the request will be so advised, with the reasons for referral.

(ii) If it is determined that the FOIA request seeks only records of another agency or department, the FOIA requester will be so informed by the FOIA Control Officer and will be directed to the correct agency or department.

(3) If it is determined that the Commission does not have authority to withhold the records from public inspection, the request will be granted.

(4) If it is determined that the Commission does have authority to withhold the records from public inspection, the considerations favoring disclosure and non-disclosure will be weighed in light of the facts presented, and the request will be granted, either conditionally or unconditionally, or denied.

(5) If there is a statutory basis for withholding part of a document from inspection, that part will be deleted and the remainder will be made available for inspection. Records disclosed in part shall be marked or annotated to show the amount of information deleted unless doing so would harm an interest protected by an applicable exemption. The location of the information deleted and

the exemption under which the deletion is made also shall be indicated on the record, if technically feasible.

(6) In locating and recovering records responsive to an FOIA request, only those records within the Commission's possession and control as of the date of its receipt of the request shall be considered.

* * * * *

(i)(1) If a request for inspection of records submitted to the Commission in confidence under § 0.457(d), § 0.459, or another Commission rule or order is granted in whole or in part, an application for review may be filed by the person who submitted the records to the Commission, by a third party owner of the records or by a person with a personal privacy interest in the records, or by the person who filed the request for inspection of records within the ten business days after the date of the written ruling. The application for review and the envelope containing it (if any) shall be captioned "Review of Freedom of Information Action." The application for review shall be filed within ten business days after the date of the written ruling, shall be delivered or mailed to the General Counsel, and shall be served on the person who filed the request for inspection of records and any other parties to the proceeding. The person who filed the request for inspection of records may respond to the application for review within ten business days after it is filed.

* * * * *

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
MAY 1 1 2010
OFFICE OF THE CLERK

No. 09-1279

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, PETITIONERS,

V.

AT&T INC. AND COMPTEL, RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT COMPTEL'S BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Corporate Disclosure Statement

Pursuant to Supreme Court Rule 29.6 COMPTEL hereby submits the following corporate disclosure statement:

COMPTEL is the leading national trade association representing communications service providers and their supplier partners. COMPTEL is a not-for-profit corporation and has not issued shares or debt securities to the public. COMPTEL does not have any parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

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RESPONDENT COMPTEL'S BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondent COMPTEL filed the Freedom of Information Act ("FOIA") request with the Federal Communications Commission ("FCC") that resulted in the order that was reviewed on appeal by the United States Court of Appeals for the Third Circuit.[1] COMPTEL submits this brief in support of the FCC's Petition for a Writ of Certiorari to review the Third Circuit's judgment.

ARGUMENT

The FCC correctly argues that the Third Circuit erred in interpreting the "personal privacy" language of FOIA Exemption 7(C)[2], 5 U.S.C. §552(b)(7)(C), to protect the "personal privacy" interests of large publicly traded corporations like AT&T and that certiorari should be granted to correct this error.

FOIA embodies a policy authorizing liberal disclosure of government records. Such records must be produced upon request unless they are specifically exempted from disclosure by one of the statute's nine exemptions. In light of the liberal disclosure policy of the statute, the exemptions are to be narrowly construed in favor of disclosure. *National Labor Relations Board v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978). Exemption 7(C) protects from disclosure records or information compiled for law enforcement purposes but only to the extent that disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[3] The Third Circuit's interpretation of Exemption 7(C) as protecting "personal privacy" rights of large publicly traded corporations is contrary to the plain text of the Exemption, the legislative history and all case law interpreting the Exemption, as well as to the binding precedent that FOIA Exemptions be narrowly construed.

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[1] *AT&T, Inc. v. Federal Communications Commission*, 582 F. 3d 490 (3rd Cir. 2009). The decision is reprinted at Appendix A to the FCC Petition for Certiorari.

[2] 5 U.S.C. §552(b)(7)(C).

The Third Circuit determined that the term "personal privacy" in Exemption 7(C) unambiguously applies to corporations because FOIA defines "person" to include corporations and "personal" is the adjectival form of person.[4] This reading cannot be reconciled either with the plain text of Exemption 7(C) or with basic principles of statutory construction. Wherever possible, the words of statutes should be interpreted in their ordinary and everyday senses. *Malat v. Riddell,* 383 U.S. 569, 571 (1966). Although this principle would not apply to the word "person" because it is a defined term in FOIA, it most certainly would apply to the words

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[3] *Id.*

[4] FCC Petition, Appendix A 10a-11a, 13a; 583 F. 3d at 496-7.

"personal" and "privacy," both of which are undefined. The defined term "person" does not appear in Exemption 7(C) and the ordinary meaning of personal privacy does not encompass the privacy interests of corporations.

In interpreting the meaning of personal privacy as that term is used in Exemption 7(C), this Court has explained that "both the common law and literal understandings of privacy encompass the *individual's* control of information concerning his or her person." *U.S. Department of Justice v. Reporters Committee for Freedom of the Press,* 489 U.S. 749, 763 (1988) (emphasis added).[5] This Court consistently has read the personal privacy language of Exemptions 6 and 7(C) to protect only the privacy of individuals. *Id.; Department of the Air Force v. Rose,* 425 U.S. 352 (1976).

The Third Circuit's expansion of this literal understanding of personal privacy to include a large, publicly traded corporation's right to control information concerning itself improperly equates an individual's personal privacy interest with a corporation's privacy interest. In *U.S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) this Court made clear that corporations do not enjoy the same right to privacy as individuals and that unlike human beings, "neither incorporated nor unincorporated associations can plead an unqualified right to conduct their affairs in secret." The Third Circuit's construction is also in conflict with every judicial decision that has addressed the personal privacy exemptions of FOIA, including other decisions issued in the Third Circuit.[6]

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[5] The Court cited A. Breckenridge, The Right to Privacy 1 (1970) ("Privacy, in my view, is the rightful claim of the *individual* to determine the extent to which he wishes to share himself with others. . . .It is also the *individual's* right to control dissemination of information about himself"); A. Westin, Privacy and Freedom 7 (1967) ("Privacy is the claim of *individuals* . . . to determine for themselves when, how and to what extent information about them is communicated to others"); Project, Government Information and the Rights of Citizens, 73 Mich. L. Rev. 971, 1225 (1974-1975) ("[T]he right of privacy is the right to control the flow of information concerning the details of one's *individuality*"). 489 U.S. at 764, n.16 (emphasis added).

The error in the Third Circuit's determination that Exemption 7(C)'s text unambiguously indicates that corporations have personal privacy interests was compounded by its refusal to examine the legislative history of the statute to confirm the propriety of its conclusion. Even where the plain meaning of a relevant statutory provision is sufficient to resolve a question, this Court nonetheless has consulted the legislative history to confirm Congress' intent. *Central Intelligence Agency v. Sims*, 471 U.S. 159, 167-168 (1985); *Environmental Protection Agency v. Mink*, 410 U.S. 73, 82 (1973). As the Court stated in *Consumer Product Safety Commission v. GTE Sylvania, Inc.* 447 U.S. 102, 108 (1980), statutory language is ordinarily deemed conclusive, "[a]bsent a clearly expressed legislative intent to the contrary." Here, where the plain language of Exemption 7(C) does not support the Third Circuit's conclusion that corporations have personal privacy interests, the legislative history should be consulted to determine whether the court's unprecedented construction of the statute is compatible with Congress' intent.

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[6] FCC Petition at Appendix A, 11a, 14a, 582 F.3d at 496, 498.

This Court's FOIA decisions are replete with reviews of the legislative history of various exemptions to verify Congressional intent. *See, e.g., FBI v. Abramson*, 456 U.S. 615, 626-628, 632 (1982) (examination of legislative history of Exemption 7); *National Labor Relations Board v. Robbins Tire & Rubber Co.*, 437 U.S. at 224-236 (extensive and detailed review of legislative history of Exemption 7(A)); *U.S. Department of Justice v. Landano*, 508 U.S. 165 (1993) (examination of legislative history of Exemption 7(D)); *Department of the Air Force v. Rose*, 425 U.S. at 362-268, 371-376, 380, nn. 16, 19 (examination of legislative history of Exemptions 2, 6 and 7); *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 155-157 (1989) (examination of legislative history of Exemption 7); *Environmental Protection Agency v. Mink*, 410 U.S. at 79, 80, 81-83, 86-91 (examination of legislative history of Exemptions 1 and 5); *Department of State v. Washington Post Co.*, 456 U.S. 595, 599-602 (1982) (examination of legislative history of Exemption 6); *U.S. Department of Justice v. Reporters Committee for Freedom of Press,* 489 U.S. at 756-766, 778, n.22 (1988) (examination of legislative history of Exemption 7(C)).

In contrast to this Court's practice, the Third Circuit stated that it did not believe it was "analytically appropriate" to infer a statute's meaning from the intent of the enacting Congress.[7] But Congress' clearly expressed legislative intent that the personal privacy language is meant to protect the privacy of individuals, not corporations, must be taken into account in order to arrive at the right result.

The "unwarranted invasion of personal privacy" language in Exemption 7(C) and Exemption 6 [8] is identical.[9] When it enacted Exemption 6 in 1966, Congress explained in both the House and Senate Reports that the personal privacy language was intended to protect individuals. The Senate Report states that

> "clearly unwarranted invasion of personal privacy" enunciates a policy that will involve a balancing of interests between the protection of an *individual's* private affairs from unnecessary public scrutiny and the preservation of the public's right to governmental information.[10]

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[7] FCC Petition, Appendix A at 14a, nn. 6, 7; 582 F.3d at 498, nn. 6, 7.

[8] 5 U.S.C. 552(b)(6).

[9] *U.S. Department of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 496 (1994) (The personal privacy language is identical, but Exemptions 7(C) and 6 differ in the magnitude of the public interest that is required to override the respective privacy interests protected by the Exemptions).

[10] Clarifying and Protecting the Right of the Public to Information, and For Other Purposes, S. Rep. No. 813, 89th Cong. 1st Sess. at 9 (1965) (emphasis added).

Similarly, the House Report states that

> The limitation of a "clearly unwarranted invasion of personal privacy provides a proper balance between the protection of an *individual's* right of privacy and the preservation of the public's right to Government information by excluding those kinds of files, the disclosure of which might harm the *individual.* The exemption is also intended to cover detailed Government records on an *individual* which can be identified as applying to that *individual* and not the facts concerning the award of a pension or benefit. . . .[11]

Because Congress used the identical personal privacy language when it added Exemption 7(C) in 1974, there is no reasonable basis for concluding that it intended for the personal privacy language in Exemption 6 to protect only the privacy interests of individuals but the same language in Exemption 7(C) to protect the privacy interests of large publicly traded corporations. *IBP, Inc. v. Alvarez,* 546 U.S. 21. 34 (2005) (same words used in different parts of same statute generally presumed to have same meaning). While the Third Circuit did not believe it was appropriate to examine the legislative history, this Court has relied upon the cited House and Senate Reports in its decisions interpreting Exemptions 6 and 7(C). *Department of the Air Force*

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[11] Clarifying and Protecting the Right of the Public to Information, H.Rep. No. 1497, 89th Cong. 2d Sess. at 11 (1966) (emphasis added).

v. Rose, 425 U.S. at 372; *U.S. Department of Justice v. Reporters Committee for Freedom of Press,* 489 U.S. at 766.

The flaw in the Third Circuit's interpretation of the personal privacy language is further evidenced by its need to attribute human emotions to corporations in order to support the interpretation. In explaining its construction, the court stated that "[c]orporations, like human beings, face public embarrassment, harassment and stigma" because of their involvement in law enforcement investigations.[12] The court's resort to anthropomorphism does not withstand scrutiny. An artificial entity like a corporation cannot feel or show embarrassment or disgrace. While a corporation's individual officers, directors or employees who are involved in a law enforcement investigation might feel embarrassed, harassed or stigmatized if their involvement was publicly disclosed, Exemption 7(C) would protect from disclosure any records that could reasonably be expected to constitute an unwarranted invasion of their personal privacy. It makes no sense to read Exemption 7(C) to confer an additional personal privacy interest on the artificial corporate entity that cannot feel embarrassment, harassment or stigma if that privacy is invaded.

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[12] FCC Petition at 14a, n. 5; 582 F. 3d at 498, n.5.

CONCLUSION

For the foregoing reasons and those set forth in the FCC's Petition For a Writ of Certiorari, COMPTEL respectfully requests that the Court grant the Petition.

Respectfully submitted,

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May 11, 2010

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
JUL 13 2010
OFFICE OF THE CLERK

No. 09-1279

IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION
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Petitioners,
v.
AT&T INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT AT&T INC.

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QUESTION PRESENTED

Whether the court of appeals properly granted the petition for review and remanded the matter to the Federal Communications Commission ("FCC") for further proceedings, where the FCC had concluded that corporations are categorically excluded from the protections of Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(C), which prevents unwarranted invasions of "personal privacy," and where the statute defines the root word "person" to include "corporation[s]," *id.* § 551(2).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent AT&T Inc. states the following:

AT&T Inc. is a publicly held company that has no parent company, and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

On April 4, 2005, respondent CompTel – a trade association representing competitors of respondent AT&T Inc. – submitted a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(3), seeking documents that AT&T submitted to petitioner the Federal Communications Commission ("FCC" or "Commission") as part of a confidential FCC investigation. *See* C.A. App. A27. Upon receiving notice of CompTel's request, AT&T submitted a letter opposing that request on the ground that the AT&T documents included in the FCC's internal file were protected from mandatory disclosure by FOIA's law-enforcement exemption, Exemption 7(C), 5 U.S.C. § 552(b)(7)(C). *See* C.A. App. A28-A36. On August 5, 2005, the FCC's Enforcement Bureau ruled that AT&T, as a corporation, is not entitled to invoke Exemption 7(C). *See* Pet. App. 34a-44a. On September 12, 2008, the FCC released an order denying AT&T's application for review of the Enforcement Bureau's order. *See id.* at 19a-33a. On September 22, 2009, the court of appeals granted AT&T's petition for review of the FCC's order and remanded the case to the FCC for further proceedings. *See id.* at 1a-18a.

1. Enacted as an amendment to the Administrative Procedure Act ("APA") in 1966, the statute known as FOIA generally requires a federal agency such as the FCC to disclose records upon request, unless a statutory exemption applies. *See* 5 U.S.C. § 552(a)(3)(A) (general disclosure requirement); *id.* § 552(b) (exemptions). FOIA "was designed to create a broad right of access to official information" – that is, information "that sheds light on an agency's performance of its statutory duties." *United States Dep't of Justice v. Reporters Comm. for Freedom of the*

Press, 489 U.S. 749, 772-73 (1989) (internal quotation marks omitted). As this Court explained in *Reporters Committee*, that congressional purpose "is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." *Id.* at 773.

One of FOIA's exemptions from mandatory disclosure – Exemption 7(C) – provides that FOIA "does not apply to matters that are . . . records or information compiled for law enforcement purposes, . . . to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). The APA, which FOIA amended, defines "person" – the noun form of the term "personal" in Exemption 7(C) – to include "an individual, partnership, corporation, association, or public or private organization other than an agency." *Id.* § 551(2). Exemption 7(C) reflects Congress's judgment that "[s]uspects, interviewees and witnesses" in law-enforcement investigations "have a privacy interest because disclosure may result in embarrassment or harassment." *Davin v. United States Dep't of Justice*, 60 F.3d 1043, 1058 (3d Cir. 1995). Exemption 7(C) also guards against the "potential disruption in the flow of information to law enforcement agencies" caused by a fear "of the prospect of disclosure." *FBI v. Abramson*, 456 U.S. 615, 630 (1982); *see* Pet. App. 14a n.5.

FOIA itself does not prohibit an agency from disclosing records to which an exemption from mandatory disclosure applies. However, the FCC has promulgated a regulation prohibiting it from disclosing material that belongs to a third party and is otherwise covered by Exemption 7(C). *See* 47 C.F.R. § 0.457(g)(3); Pet. App. 7a n.2.

2.a. In August 2004, AT&T voluntarily and confidentially informed the FCC of concerns regarding certain invoices related to the FCC "E-Rate" program. *See* Pet. App. 2a-3a. The E-Rate program is the universal service mechanism designed to assist schools and libraries in gaining access to affordable telecommunications services and Internet access. *See id.* at 2a.[1] In its disclosure to the FCC, AT&T explained that its Connecticut subsidiary, Southern New England Telephone Company, had submitted arguably improper invoices to the universal service fund administrator relating to certain services provided to the New London, Connecticut school district. *See id.* at 2a-3a.[2] AT&T refunded to the universal service fund administrator all amounts collected pursuant to the questionable invoices, and it cancelled outstanding invoices that raised similar concerns. *See* Consent Decree, *SBC Communications Inc.*, 19 FCC Rcd 24015, ¶ 3 (2004) ("Consent Decree").

In response to AT&T's voluntary disclosure, the FCC's Enforcement Bureau conducted an investigation. *See* Pet. App. 3a. In the course of the Enforcement Bureau's investigation, the Bureau ordered AT&T to produce, and AT&T did produce, a wide range of documents. *See id.* Those documents included detailed written responses to the Enforcement Bureau's interrogatories; names and job descriptions of AT&T employees involved in the arguably improper billing; completed universal service fund invoice forms; internal AT&T emails (including documents attached to those emails) that provided cost, pricing, and billing information in connection with the services provided to New London public schools and that indicated how AT&T came to invoice the universal service fund for certain aspects of those services; and AT&T's written views regarding whether and the extent to which its employees had violated AT&T's Code of Business Conduct. *See id.*

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[1] *See* 47 C.F.R. §§ 54.500-54.523; Second Report and Order and Further Notice of Proposed Rulemaking, *Schools and Libraries Universal Service Support Mechanism*, 18 FCC Rcd 9202, ¶¶ 1-90 (2003) (describing E-Rate).

[2] The universal service fund administrator is an independent, not-for-profit corporation that administers the federal universal service fund on behalf of the FCC. *See* Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, *Comprehensive Review of Universal Service Fund Management, Administration, and Oversight*, 20 FCC Rcd 11308, ¶ 4 (2005); 47 C.F.R. §§ 54.701-54.702.

In December 2004, the FCC adopted a consent decree resolving its investigation; the order and consent decree involved no admission of wrongdoing on behalf of AT&T. *See* Order, *SBC Communications Inc.*, 19 FCC Rcd 24014 (Enf. Bur. 2004). The Consent Decree, which is publicly available, states that AT&T had voluntarily informed the Enforcement Bureau that AT&T's subsidiary had invoiced the universal service fund administrator (i) "in one funding year for services provided in another"; (ii) "for services it provided to certain schools and other entities for which it had not sought and obtained authorization"; and (iii) "for services that are not eligible for [universal service fund] support." Consent Decree ¶ 3.

b. On April 4, 2005, CompTel submitted a one-sentence FOIA request demanding the contents of the Enforcement Bureau's investigative file. *See* C.A. App. A27 (Email from Mary C. Albert, CompTel, to FOIA FCC (Apr. 4, 2005)). CompTel did not reveal –

either in its FOIA request or thereafter – why it sought the contents of the Bureau's file.

On May 27, 2005, three days after receiving notice of CompTel's request, AT&T submitted a letter opposing disclosure. *See id.* at A28-A36 (Letter from Jim Lamoureux, SBC Services, Inc., to Judy Lancaster, Enforcement Bureau, FCC, FOIA Control No. 2005-333 (May 27, 2005)). AT&T explained that the internal documents that AT&T had produced to the Bureau had been "compiled for law enforcement purposes" and were protected from disclosure under FOIA Exemption 7(C) and 47 C.F.R. § 0.457(g)(3). (AT&T also explained that the documents included competitively sensitive information that was protected from disclosure under FOIA's exemption for confidential commercial information (Exemption 4), *see* 5 U.S.C. § 552(b)(4).) CompTel responded approximately one month later with a letter filing in which it disputed AT&T's claims. *See* C.A. App. A37-A40 (Letter from Mary C. Albert, CompTel, to Judy Lancaster, Enforcement Bureau, FCC, FOIA Control No. 2005-333 (June 28, 2005)).

On August 5, 2005, the Enforcement Bureau issued a letter ruling in which it rejected AT&T's reliance on Exemption 7(C). *See* Pet. App. 34a-44a. It reasoned that "businesses do not possess 'personal privacy' interests as required for application" of that exemption. *Id.* at 42a-43a. The Bureau stated that, unless AT&T filed an application for review by the full Commission, it would produce the records CompTel requested, except to the extent they revealed internal FCC communications, names and identifying information of particular AT&T employees, or what the Bureau considered to be confidential commercial information. *See id.* at 40a-44a.

c. On August 19, 2005, AT&T filed an application for review with the full Commission challenging the Enforcement Bureau's conclusion that Exemption 7(C) is categorically inapplicable to corporations. *See* C.A. App. A47-A54 (Letter from Jim Lamoureux, SBC Services, Inc., to Samuel Feder, Acting General Counsel, FCC, FOIA Control No. 2005-333 (Aug. 19, 2005)). AT&T argued that the "broad" protection afforded by Exemption 7(C) was designed to "protect parties who had been the subject of law enforcement proceedings from embarrassment, reprisal or harassment." *Id.* at A48 (internal quotation marks and alterations omitted). AT&T explained that there was no reason to exclude corporations as a rule from that "broad" protection, thereby potentially subjecting them to "the embarrassment, reprisal or harassment" associated with law-enforcement investigations. *Id.* at A52.[3]

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[3] CompTel filed its own application for review challenging the Enforcement Bureau's decision to withhold or redact certain categories of records. *See* C.A. App. A55-A60 (Letter from Mary C. Albert, CompTel, to Samuel Feder, Acting General Counsel, FCC, FOIA Control No. 2005-333 (Sept. 6, 2005)). In October 2006, when the FCC had not ruled on either party's application for review, CompTel initiated a civil action in the United States District Court for the District of Columbia seeking disclosure. *See* Compl., *CompTel v. FCC*, No. 1:06-cv-01718-HHK (D.D.C. filed Oct. 5, 2006); *see also* 5 U.S.C. § 552(a)(6)(A)(i), (C)(i) (providing that a FOIA requester will have exhausted administrative remedies if the agency does not decide an administrative appeal within 20 days). AT&T intervened and resisted disclosure, in part on the basis of its claim that the AT&T documents at issue were protected by Exemption 7(C). On March 5, 2008, the district court stayed further action pending the FCC's resolution of "AT&T's intra-agency appeal" on the applicability of Exemption 7(C). Memorandum Opinion and Order at 6, *CompTel v. FCC*, No. 1:06-cv-01718-HHK (D.D.C. Mar. 5, 2008). That stay remains in place.

On September 12, 2008, the FCC denied AT&T's application for review and ordered disclosure of AT&T's records as specified in the Enforcement Bureau's decision. *See* Pet. App. 19a-33a. The Commission explained that it "disagree[d] with [AT&T's] contention that [it] should withhold all of the documents that [AT&T] submitted in response to [the Enforcement Bureau's] letter of inquiry under Exemption 7(C)." *Id.* at 26a. That was so, the FCC said, because, as a per se matter, a corporation has no "'personal privacy' interests within the meaning of Exemption 7(C)." *Id.*[4]

3. The Third Circuit granted AT&T's petition for review and remanded the case to the FCC for further proceedings. *See* Pet. App. 1a-18a.[5] The court began its analysis by noting that the FCC's interpretation of Exemption 7(C) is not entitled to deference, because "FOIA applies government-wide, and no one agency is charged with enforcing it." *Id.* at 9a-10a. Interpreting the statute de novo, the court rejected the FCC's categorical assertion that the phrase "personal privacy" in Exemption 7(C) excludes corporations. The court explained that FOIA's plain text compels the conclusion that corporations can have "personal privacy" under Exemption 7(C), because "'personal' is the adjectival form of 'person,' and FOIA defines 'person' to include a corporation." *Id.* at 11a; *see* 5 U.S.C. § 551(2). It further noted that another FOIA exemption – Exemption 7(F) – protects information that "could reasonably be expected to endanger the life or physical safety of any *individual*," 5 U.S.C. § 552(b)(7)(F) (emphasis added), demonstrating that "Congress knew how to refer solely to human beings (to the exclusion of corporations and other legal entities) when it wanted to." Pet. App. 12a.

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[4] On AT&T's motion, which the FCC did not oppose, the court of appeals granted a stay of the FCC's order pending appeal. *See* Pet. App. 5a n.1.

[5] The court of appeals first addressed, and rejected, CompTel's contention that the court lacked jurisdiction to review the FCC's order. The court noted that the courts of appeals generally have jurisdiction to review "final orders" of the FCC, 28 U.S.C. § 2342(1), that are issued "under" the Communications Act of 1934, 47 U.S.C. § 402(a). *See* Pet. App. 6a. Because the FCC order under review "adjudicated AT&T's claim that disclosure of the information collected by the FCC concerning the E-Rate program in New London would violate FCC regulations implementing Exemption 7(C)," the FCC's order "constituted an order 'under' the Communications Act within the meaning of" those jurisdictional statutes. *Id.* at 7a-8a.

The court of appeals also addressed the FCC's and CompTel's argument that, because FOIA Exemption 6 (which protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(6)) applies only to individuals, and the phrase "personal privacy" must have the same meaning in Exemptions 6 and 7, the phrase "personal privacy" in Exemption 7 must exclude corporations. Without accepting the premise that only individuals can invoke Exemption 6 (an issue on which it "express[ed] no opinion," Pet. App. 13a), the court explained that Exemption 6 contains other language not found in Exemption 7(C) – namely, the phrase "personnel and medical files" – that could be read as limiting the application of Exemption 6 to natural persons. *Id.* Thus, the court reasoned, to the extent Exemption 6 does not protect corporations, it is not because the provision contains the phrase "personal privacy" but because other words in the statute arguably limit its application to human beings.

Having concluded that Exemption 7(C)'s language is "unambiguous[]," the court of appeals explained that it need not resolve the parties' disputes regarding statutory purpose, legislative history, and the applicability of cases from other circuits. *Id.* at 13a-14a. Even so, it observed that "interpreting 'personal privacy' according to its plain textual meaning serves Exemption 7(C)'s purpose of providing broad protection to entities involved in law enforcement investigations in order to encourage cooperation with federal regulators." *Id.* at 14a n.5. The court also explained that the D.C. Circuit cases on which the FCC and CompTel relied did not "impugn [its] textual analysis," because none addressed the question whether a corporation has "personal privacy" interests within the meaning of Exemption 7(C). *Id.* at 14a n.6.

Finally, the court of appeals rejected AT&T's assertion that remanding the matter to the FCC was unnecessary because the invasion of personal privacy that would result from disclosure of AT&T's documents would be "unwarranted" under Exemption 7(C) as a matter of law. *See id.* at 15a-17a. The court noted AT&T's contention that, "'when [a FOIA] request seeks no "official information" about a Government agency, but merely records that the Government happens to be storing,' granting that request would, as a matter of law, constitute a 'clearly unwarranted' invasion of personal privacy within the meaning of Exemption 7(C)." *Id.* at 16a (quoting *Reporters Comm.*, 489 U.S. at 780) (alteration in original). It reasoned, however, that CompTel had "indeed alleged that it seeks" information on "the FCC's administration of E-Rate" and that the requested documents "may shed light" on that subject. *Id.* at 16a-17a. Consequently, the court remanded the matter to the FCC with instructions "to determine, in accordance with [the court's] construction of Exemption 7(C), whether disclosure 'could reasonably be expected to constitute an unwarranted invasion of personal privacy.'" *Id.* at 17a (quoting 5 U.S.C. § 552(b)(7)(C)).[6]

The government filed a petition for rehearing, which the court of appeals denied on November 23, 2009.

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[6] The Enforcement Bureau also had concluded, and the Commission had agreed, that AT&T had failed to comply with 47 C.F.R. § 0.459, the FCC regulation governing requests for confidential treatment of materials submitted to the agency, when it had submitted the material pursuant to the Enforcement Bureau's order. *See* Pet. App. 24a-25a, 38a-40a. That conclusion was incorrect because, under the regulation's plain terms, no request for confidential treatment is necessary when, as here, an exemption from disclosure under 47 C.F.R. § 0.457 applies. *See* 47 C.F.R. § 0.459(a)(1) ("If the materials are specifically listed in § 0.457, [a request for confidential treatment] is unnecessary."). In any event, the FCC did not rest on that ground and instead proceeded to decide the merits of AT&T's objection to disclosure. *See* Pet. App. 25a. And the court of appeals rejected the FCC's contention that AT&T's alleged failure to request confidential treatment provided a basis on which to sustain the FCC's order. *Id.* at 8a-9a. The petition neither defends the FCC's conclusion nor challenges the court of appeals' resolution of this issue.

REASONS FOR DENYING THE PETITION

The petition seeks review of the Third Circuit's judgment to consider whether corporations can have privacy interests protected by Exemption 7(C) of FOIA. *See* Pet. I. In support of that request, the government identifies no division of authority in the lower courts over whether Exemption 7(C) can be invoked by corporations. Instead, it asserts that the court of appeals' interpretation of the statute is erroneous. *See* Pet. 14-27. And it contends that declining to impose a categorical exclusion of all corporations from Exemption 7(C) would increase the government's burden in processing FOIA requests. *See* Pet. 27-30.

Further review of the court of appeals' interlocutory decision is unwarranted at this time for four primary reasons. First, the court's decision does not conflict with any decision of this Court or any other court of appeals. Indeed, the government identifies no other court of appeals decision addressing a corporation's right under Exemption 7(C) to protect records from mandatory disclosure. Without a division of authority in the lower courts, this Court's intervention would be unjustified.

Second, the government's claim that the decision below will wreak havoc with the administration of FOIA is tenuous at best. The court of appeals' ruling requires only that agencies *consider* the privacy interests of corporations in the balancing analysis set forth in Exemption 7(C). The government does not quantify the number of FOIA requests that the Third Circuit's decision will implicate or provide any other support for the claim that applying the Third Circuit's interpretation of Exemption 7(C) would create a significant burden for agencies.

Third, the interlocutory posture of this case makes certiorari inappropriate. The Third Circuit did not hold that Exemption 7(C) bars disclosure of the records in question. Instead, it remanded the matter to the FCC to apply Exemption 7(C) in the first instance. If the FCC concludes that disclosure of AT&T's records could not reasonably be expected to constitute an unwarranted invasion of AT&T's privacy interests, then the court of appeals' holding on the meaning of Exemption 7(C) will have been unnecessary to the outcome in this case.

Fourth, the court of appeals' judgment is correct. FOIA's plain language establishes that corporations can claim "personal privacy" interests under Exemption 7(C). The statute defines "person" to include corporations, *see* 5 U.S.C. § 551(2), and Congress's choice of the adjectival form of that defined term – "personal" – must be understood to refer to that definition. *See* Pet. App. 11a ("It would be very odd indeed for an adjectival form of a defined term *not* to refer back to that defined term."). The petition should be denied.

I. THIS COURT'S REVIEW OF THE COURT OF APPEALS' INTERPRETATION OF EXEMPTION 7(C) IS UNWARRANTED

A. There Is No Division of Authority Warranting This Court's Intervention

The government does not claim explicitly that the Third Circuit's judgment conflicts with the decision of any other court of appeals, *see* Pet. 20-21, and with good reason.[7] The cases on which the government relies do not establish a conflict requiring this Court's resolution.

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[7] Indeed, for its part, CompTel straightforwardly invites this Court to engage only in error correction. *See* CompTel Br. 1 ("certiorari should be granted to correct [an] error").

1. Only one of the cases that the government cites (at 20) involved Exemption 7(C), *see Washington Post Co. v. United States Dep't of Justice*, 863 F.2d 96 (D.C. Cir. 1988). But the opinion in *Washington Post* does not indicate that either of the parties resisting the FOIA request in that case argued that disclosure would invade the privacy interests of the corporation (Eli Lilly) that had submitted the document in question. *See id.* at 100-01. Instead, the Department of Justice ("DOJ") and Eli Lilly appear to have contended only that disclosure would invade the privacy of particular Eli Lilly employees. *See id.*

The document at issue in *Washington Post* was the report of an investigation by a special outside committee of Eli Lilly's board of directors and an outside law firm into the company's development and marketing of an arthritis drug that had been withdrawn from the market after reports of serious adverse reactions. *See id.* at 99. The Eli Lilly board had charged the committee with determining, among other things, whether "the company had any claims against employees." *Id.* The DOJ subsequently commenced its own investigation, and it requested and obtained from Eli Lilly a copy of the special committee's report. *See id.* Eli Lilly publicized the existence of both the special committee's report and the DOJ's investigation. *See id.* In covering the story, the Washington Post requested under FOIA a copy of the special committee's report. *See id.* In rejecting the DOJ's reliance on Exemption 7(C) to withhold the report, the D.C. Circuit concluded that disclosure of the report would not invade any cognizable privacy interest of any Eli Lilly employee, because the report was an "assessment of the business decisions of Lilly employees during the development and marketing of a commercial product." *Id.* at 100. It further observed that "the protection accorded reputation" by Exemption 7(C) generally would shield from disclosure documents accusing employees "of having committed a crime" or showing them to be "the target of a law enforcement investigation." *Id.* at 100-01. Thus, the upshot of the court's analysis was that, as to individuals, Exemption 7(C) protects documents relating to alleged criminality, not documents pertaining to ordinary "business judgments." *Id.* at 100. The court did not address – because it was not presented – the question whether Eli Lilly's own privacy interests might have justified withholding of the report.

2. Aside from *Washington Post*, the government principally relies (at 20) on D.C. Circuit cases construing a different FOIA exemption – Exemption 6, which protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The government asserts that the D.C. Circuit has interpreted the phrase "personal privacy" in Exemption 6 to refer only to the privacy interests of individuals. Because the phrase "personal privacy" must mean the same thing in both Exemptions 6 and 7(C), the theory goes, a D.C. Circuit panel would be bound to reject the Third Circuit's interpretation of Exemption 7(C).

As an initial matter, the law in the D.C. Circuit regarding whether Exemption 6 protects corporate privacy interests is far from clear. In *Judicial Watch, Inc. v. FDA*, 449 F.3d 141 (D.C. Cir. 2006), which the government does not cite, the D.C. Circuit stated that the "personal privacy" protections in Exemption 6 applied to "private individuals *and companies.*" *Id.* at 152 (emphasis added). There, the Food and Drug Administration ("FDA"), citing FOIA Exemption 6, had withheld information relating to "private individuals and companies who worked on the approval" of a controversial drug. *Id.* The petitioner argued that such information could not be withheld because it was not "'about an individual.'" *Id.* The D.C. Circuit rejected that "crabbed reading of the statute," noting that the Supreme Court has instructed that the privacy interests protected by FOIA should be construed "broadly." *Id.* The court further explained that the privacy interests at stake under FOIA "vary depending on . . . context" and that, in that case, disclosure of information about "persons and businesses associated with [the drug]" risked retaliation against those individuals and entities and therefore implicated the privacy interests of Exemption 6. *Id.* at 153 (internal quotation marks omitted). The court thus concluded that the FDA's withholding of information under the "personal privacy" protections of Exemption 6 was proper to protect private parties – including "companies" and "businesses" – "from the injury and embarrassment that can result from the unnecessary disclosure" of protected information. *Id.* at 152-53 (internal quotation marks omitted).

The assertedly contrary statements in the cases on which the government relies (at 20) were unnecessary to the holdings in those cases. In *Multi Ag Media LLC v. Department of Agriculture*, 515 F.3d 1224 (D.C. Cir. 2008), the D.C. Circuit rejected the applicability of Exemption 6 because it held that any invasion of privacy would not be "clearly unwarranted" in light of the strong interest in enabling the public to monitor the Department of Agriculture's implementation of the benefit program at issue. *See id.* at 1232 (internal quotation marks omitted). Further, although the court opined that "businesses . . . do not have protected privacy interests under Exemption 6," it offered that view in discussing an issue that the parties had not "contest[ed]" and in concluding that information in the business records was "traceable to an *individual*" and therefore within the scope of Exemption 6 in any event. *Id.* at 1228. The court thus had no occasion to revisit the conclusion in *Judicial Watch* that corporations can invoke the "personal privacy" protections of Exemption 6.

Similarly, in *Sims v. CIA*, 642 F.2d 562 (D.C. Cir. 1980), the Central Intelligence Agency made "no claim that the names of the institutions participating in" the program at issue could be withheld under Exemption 6. *Id.* at 572 n.47. And, in *National Parks & Conservation Association v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976), the court raised the possible applicability of Exemption 6 on its own and said only that Exemption 6 had "not been extended to protect the privacy interests of businesses or corporations," *id.* at 685 n.44; it did not say that such an extension would be unwarranted in an appropriate case. In sum, none of the cases on which the government relies for its claim that the Third Circuit has departed from a long line of consistent D.C. Circuit precedent holds that corporations are categorically excluded from claiming the protection of Exemption 6, and the D.C. Circuit's recent decision in *Judicial Watch* supports the opposite conclusion. Thus, even assuming that cases considering the applicability of Exemption 6 to corporations are even relevant to the scope of Exemption 7(C), it is far from clear that these cases hold that Exemption 6 categorically excludes corporations.

In any event, even if the government were correct that a number of cases have held that corporations do not have privacy interests cognizable under Exemption 6, the Third Circuit's conclusion that corporations are not categorically excluded from Exemption 7(C) is not in conflict with them. Unlike Exemption 7(C), which potentially can apply to any type of record compiled for law-enforcement purposes, Exemption 6 protects only certain types of records – namely, "personnel and medical files and similar files." 5 U.S.C. § 552(b)(6). As the court of appeals in this case explained, "only individuals (and not corporations) may be the subjects of such files." Pet. App. 13a. Therefore, to the extent only individuals can invoke Exemption 6, it is because a corporation does not have a privacy interest in an individual's personnel or medical file, not because the phrase "personal privacy" excludes corporations.[8]

At a minimum, the differences in the types of files that Exemptions 6 and 7(C) protect preclude reflexive application of precedents interpreting one exemption to the other without consideration of their differing language. Thus, even if the D.C. Circuit had developed a firm view that Exemption 6 does not protect the privacy interests of corporations (and, in light of *Judicial Watch*, it has not), it would be entirely premature to say that a conflict exists between that court and the Third Circuit. At the very least, this Court should wait until the D.C. Circuit has had an opportunity squarely to address whether a corporation can have "personal privacy" within the meaning of Exemption 7(C) before it grants review of this issue.

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[8] The cases the government cites (at 21 n.8) for the proposition that Exemptions 6 and 7(C) protect the same privacy interests are not to the contrary. None considered the question whether either exemption protects any interest in corporate privacy. *See Forest Serv. Employees for Envtl. Ethics v. United States Forest Serv.*, 524 F.3d 1021 (9th Cir. 2008) (dispute over redaction of names of individual employees from government report); *Horowitz v. Peace Corps*, 428 F.3d 271 (D.C. Cir. 2005) (dispute over withholding of name of individual who had accused government employee of misconduct); *FLRA v. United States Dep't of Veterans Affairs*, 958 F.2d 503 (2d Cir. 1992) (Veteran Affairs' challenge to Federal Labor Relations Authority order requiring VA to disclose names and addresses of employees in the bargaining unit).

B. The Government's Claim of Adverse Consequences Is Speculative and Insubstantial

The government's argument that the Third Circuit's ruling "threatens" significant adverse consequences boils down to the following complaint: agencies actually will have to consider whether disclosure of a corporation's records compiled for law-enforcement purposes could reasonably be expected to constitute an unwarranted invasion of privacy, rather than automatically producing such documents without even considering the applicability of Exemption 7(C). *See* Pet. 27-29. This supposed harm is illusory.

First, although the government asserts (at 13) that it receives hundreds of thousands of FOIA requests each year, it does not identify the (presumably much smaller) number of requests that seek documents compiled for law-enforcement purposes the disclosure of which potentially could result in an unwarranted invasion of a corporation's privacy. Thus, it is difficult to judge the actual number of FOIA requests that might have to be processed differently in light of the court of appeals' decision. The speculative quality of the government's claim reinforces the wisdom of permitting the D.C. Circuit and other courts of appeals to decide whether to reject or to follow the Third Circuit's interpretation of Exemption 7(C) before this Court intervenes. If in time a mature circuit conflict were to develop on the question, this Court presumably would have available to it better information with which to evaluate what impact, if any, the Third Circuit's decision has had on the government's administration of FOIA.

Second, there is no reason to conclude that simply considering the privacy interests of corporations under Exemption 7(C) will be an insufferable burden for agencies. Agencies and courts faced with FOIA questions routinely engage in such balancing, without experiencing anything like the parade of horribles the FCC alarmingly predicts. *See, e.g.*, *Computer Prof'ls for Soc. Responsibility v. United States Secret Serv.*, 72 F.3d 897, 904-05 (D.C. Cir. 1996) (conducting balancing analysis under Exemption 7(C)). Moreover, reading Exemption 7(C) consistent with its text does not mean that corporate privacy interests would be afforded the same treatment as individual privacy interests in all cases, as AT&T explicitly recognized in its submissions to the Third Circuit, *see* AT&T C.A. Br. 34.[9]

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[9] The government also suggests (at 28 n.12) that agencies will have to weigh corporate privacy interests in applying their own regulations governing requests for information. To the extent the agency's regulations simply track the language of the FOIA exemption, thus protecting from disclosure documents that are exempt from mandatory disclosure under FOIA, then there is no additional burden. For example, here, the FCC's regulations prohibit disclosure of AT&T's documents if they fall within

The government also argues (at 29-30) that differences in the approaches of the Third Circuit and the D.C. Circuit will encourage forum shopping and create uncertainty for federal agencies. But, contrary to the premise of the government's argument, whether corporations have privacy interests protected under Exemption 7(C) remains an open question in the D.C. Circuit. *See supra* Part I.A. If the D.C. Circuit follows the Third Circuit's interpretation of Exemption 7(C), then the government's concern will be eliminated. In any event, the government remains free to pursue its construction of Exemption 7(C) in other cases. *See United States v. Mendoza*, 464 U.S. 154, 160 (1984) (rejecting the application of nonmutual collateral estoppel against the government because it "would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari").

C. The Interlocutory Posture of This Case Makes This Court's Review Particularly Inappropriate at This Time

Review of the Third Circuit's decision also is unwarranted at this stage because the decision below is interlocutory. The court of appeals rejected AT&T's contention that the documents should be withheld as a matter of law because disclosing them "could reasonably be expected to constitute an unwarranted

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Exemption 7(C), without the need for further inquiry. *See* 47 C.F.R. § 0.457(g)(3); Pet. App. 7a n.2; *see also* 47 C.F.R. § 0.457 (providing that the FCC will not entertain requests for disclosure under § 0.461 when the documents in question "are not the property of the Commission"). In any event, to the extent that an agency regulation imposes an unnecessary burden, the agency itself could remedy that problem by amending the regulation.

invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C); *see* Pet. App. 16a-17a. Instead, the court remanded the matter to the FCC to apply Exemption 7(C) in the first instance. *See* Pet. App. 17a-18a.

Further proceedings on remand could render the resolution of the question presented unnecessary in this case; to the extent that does not occur, further review would be available after the FCC's final action. If the FCC determines that disclosing the requested records would not work an "unwarranted" invasion of AT&T's privacy interests, and that action is upheld on review, then the Third Circuit's conclusion that Exemption 7(C) does not categorically exclude corporations would be irrelevant to the ultimate outcome in this matter. If, on the other hand, the FCC rules on remand that Exemption 7(C), as interpreted by the Third Circuit, covers some or all of the records at issue, then the propriety of the Third Circuit's statutory construction could be considered by this Court on review of the FCC's final action. The interlocutory nature of this matter makes any review by this Court premature. *See Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-58 (1916); *see also* Brief for the Federal Energy Regulatory Commission in Opp. at 12, 17, *Coral Power, L.L.C. v. California ex rel. Brown*, Nos. 06-888 & 06-1100 (U.S. filed Apr. 25, 2007) (contending that remand to the agency rendered certiorari "inappropriate" and "premature").[10]

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[10] Although the FCC itself might be unable to seek review of its own decision to withhold documents under Exemption 7(C), respondent CompTel, which continues to pursue its FOIA request and has submitted a brief in support of the petition,

II. THE COURT OF APPEALS CORRECTLY INTERPRETED THE STATUTE

A. The court of appeals correctly concluded that the "plain text" of Exemption 7(C) "unambiguously" applies to corporations. Pet. App. 11a, 13a. "As in any case of statutory construction," this Court's "analysis begins with the language of the statute," and, "where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (internal quotation marks omitted). Exemption 7(C) provides that FOIA's mandatory disclosure obligation "does not apply" to "records or information compiled for law enforcement purposes, . . . to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). The word "personal" means "of or relating to a particular person." *Webster's Third New International Dictionary* 1686 (2002); *accord Webster's New International Dictionary* 1828 (2d ed. 1950) (defining "personal" to mean "[o]f or pertaining to a particular person"). In this context, Congress has defined "person" to include "an individual, partnership, corporation, association, or public or private organization other than an agency." 5 U.S.C. § 551(2). By expressly defining the noun "person" to include corporations, Congress necessarily defined the adjectival form of that noun – *i.e.*, "personal" –

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would be able – and would have every incentive – to do so. In addition, as noted above, nothing precludes the FCC or other government agencies from continuing to apply the government's interpretation of Exemption 7(C) in other cases, *see Mendoza*, 464 U.S. at 160, and the government of course would be able to seek further review of any future court of appeals decision adopting or following the reasoning of the Third Circuit.

also to include corporations. As the court of appeals explained, because "'personal' is the adjectival form of 'person,' and FOIA defines 'person' to include a corporation," Pet. App. 11a, the phrase "personal privacy" in Exemption 7(C) includes not only individual privacy but also corporate privacy. *See id.* ("It would be very odd indeed for an adjectival form of a defined term *not* to refer back to that defined term.").

That reading is confirmed by the fact that, where Congress intends to refer to natural persons and to exclude corporations – both in FOIA itself and in the closely related Privacy Act of 1974 – it uses the term "individual." In FOIA, Congress differentiated between the term "personal" (as, for example, in Exemption 7(C)) and the term "individual," which is used, for example, in Exemption 7(F), *see* 5 U.S.C. § 552(b)(7)(F). That choice must be presumed to be intentional and further confirms that Congress knew how to exclude non-natural persons when it intended to do so. *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted, alterations in original); Pet. App. 12a (Exemption 7(F)'s language shows that "Congress knew how to refer solely to human beings (to the exclusion of corporations and other legal entities) when it wanted to").

In the Privacy Act, Congress chose to protect only "individual[s]," 5 U.S.C. § 552a(a)(2), thereby excluding "corporations or sole proprietorships," *St. Michael's Convalescent Hosp. v. California*, 643 F.2d 1369, 1373 (9th Cir. 1981).[11] That Congress expressly incorporated some FOIA definitions into the Privacy Act, *see* 5 U.S.C. § 552a(a)(1) (defining "agency" as that term is defined in FOIA, *id.* § 552(e)), reinforces the significance of Congress's decision to define "individual" separately under § 552a(a)(2). Indeed, Congress used both "person" and "individual" in the Privacy Act, further demonstrating that Congress understood the distinction between the two. *See, e.g.*, *id.* § 552a(b) ("[n]o agency shall disclose any record . . . to any *person*, or to another agency, except pursuant to a written request by, or with the prior written consent of, the *individual* to whom the record pertains") (emphases added). Yet, unlike the Privacy Act, FOIA Exemption 7(C) does not use the term "individual" (e.g., "individual privacy") or include any other textual indication of an intent to exclude corporations. The absence of such a limitation is compelling evidence that the scope of Exemption 7(C) is not so limited.

An interpretation of Exemption 7(C) that allows for the possibility of corporate privacy rights accords not only with the text of the exemption, but also with its purposes. Exemption 7(C) "affords broad[] privacy rights to suspects, witnesses, and investigators" in law-enforcement investigations. *Bast v. United States Dep't of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981). The exemption reflects Congress's judgment that "[s]uspects, interviewees and witnesses have a privacy interest because disclosure [of requested information] may result in embarrassment or harassment." *Davin*, 60 F.3d at 1058. Put differently, Exemption 7(C) protects the personal privacy of those parties participating in law-enforcement investigations – whether as suspects, witnesses, or cooperating parties – because the disclosure of information pertaining to those investigations may be used to embarrass, harass, or stigmatize those parties.

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[11] *See Reporters Comm.*, 489 U.S. at 766-67 (drawing comparison to the Privacy Act in interpreting FOIA).

That purpose plainly applies to corporations. Corporations, like individuals, are routinely suspects or cooperating parties (or both) in law-enforcement investigations. And corporations, like individuals, face the prospect of public embarrassment, harassment, and stigma based upon their involvement in such investigations.[12] The FCC's construction of Exemption 7(C) thus categorically excludes an important set of actors that can be swept into law-enforcement investigations, and then later made to suffer serious consequences. That outcome cannot be squared with the Exemption's purpose.

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[12] *See* Cindy R. Alexander, *On the Nature of the Reputational Penalty for Corporate Crime: Evidence*, 42 J.L. & Econ. 489, 492 (1999) (citing study showing that "publicly traded corporations sustained substantial losses in goodwill when named as targets of [Federal Trade Commission] investigations for having possibly violated its regulations against false and misleading advertising"); Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. Legal Stud. 319, 332 (1996) ("[c]orporations convicted of crimes may well suffer significant reputational losses"); Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 Geo. L.J. 1743, 1771-72 (2005) ("Investigations and convictions of corporations, like those of individuals, often trigger significant extralegal sanctions for the defendants and their employees. These sanctions include loss of morale, damage to reputation and corporate image, damage to relationships with customers, suppliers, and the government, bars to future business, and (as a consequence of all of this) significant drops in share price and market share. The size of these extralegal penalties often dwarfs that of the formal legal penalties.") (footnotes omitted).

Beyond that, a cramped view of the scope of Exemption 7(C) could chill voluntary cooperation by corporations and other non-natural persons in law-enforcement investigations. As the facts of this case bear out, corporations routinely cooperate in law-enforcement investigations, often initiating such investigations themselves upon discovery of potential wrongdoing. A rule foreclosing the possibility of invoking Exemption 7(C) could make corporations less willing to do so, out of concern that potentially damaging confidential information could, as the FCC held here, be made public based on nothing more than a one-sentence FOIA request from a group of competitors. *See* Pet. App. 14a n.5 ("Reading 'personal privacy' to exclude corporations would disserve Exemption 7(C)'s purpose of encouraging corporations – like human beings – to cooperate and be forthcoming in such investigations.").

B. The government's criticisms of the Third Circuit's reasoning are unpersuasive.

1. The FCC offers two textual bases for limiting Exemption 7(C) to individuals, neither of which withstands scrutiny. First, it contends that the word "personal" is "most naturally understood" to refer only to individuals. Pet. 14. But the primary dictionary definitions the government cites define "personal" as "of or relating to a particular person." *See* Pet. 14-15; *supra* p. 22. When, as in this context, the statute defines "person" to include both an "individual" and a "corporation," 5 U.S.C. § 551(2), it would be *unnatural* to conclude that the adjectival form of "person" excludes corporations. Moreover, the word "personal," no less than "person," can quite comfortably be used to refer to corporations. For example, corporations have long been understood to be "persons" for the purposes of the Fifth and Fourteenth Amendments to the United States Constitution, *see, e.g., Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936) ("a corporation is a 'person' within the meaning of the equal protection and due process of law clauses"), and therefore protected by the doctrine of "personal" jurisdiction that inheres in the concept of due process, *see, e.g., Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 109-10 (1987) (plurality); 28 U.S.C. § 1391(c) ("a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction").[13]

Second, the government asserts that the use of the word "privacy" in combination with "personal" leaves no room for Exemption 7(C) to apply to corporations. In support, it observes that corporations cannot sue for the tort of invasion of privacy. *See* Pet. 15. But this Court has made clear that "the statutory privacy right protected by Exemption 7(C) goes beyond the common law and the Constitution." *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 170 (2004). And it specifically has distinguished "[t]he question of the statutory meaning of privacy under the FOIA" from "the question whether a tort action might lie for invasion of privacy." *Reporters Comm.*, 489 U.S. at 762 n.13.

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[13] The government also argues that the Third Circuit relied too heavily on the linguistic relationship between "person" and "personal" because the word "personnel" also "shares the same 'root'" and "cannot encompass a corporation." Pet. 23 n.10. But, unlike "personal," "personnel" is not simply the adjectival form of "person." Instead, "personnel" is a word with a specialized meaning; it refers to employees in some service, *see Webster's Third New International Dictionary* at 1687; *Webster's New International Dictionary* at 1828, and thus relates only to natural persons.

Further, in many areas of law, corporations are entitled to invoke the same protections as individuals, including protections rooted in fundamental privacy concerns. For example, this Court has held that corporations have privacy interests under the Fourth Amendment. *See Dow Chem. Co. v. United States*, 476 U.S. 227, 236 (1986) ("Dow [Chemical Co.] plainly has a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings, and it is equally clear that expectation is one society is prepared to observe."); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353-54 (1977).[14]

Indeed, of particular significance here, this Court has expressly recognized that corporations can invoke constitutional protections – akin to the protections of Exemption 7(C) – that are rooted in the desire to prevent embarrassment and anxiety. The Fifth Amendment's guarantee against double jeopardy, the Court has explained, is intended to ensure that a defendant is not "subject[ed] . . . to embarrassment, expense and ordeal" and to protect against the "continuing state of anxiety and insecurity" resulting from a second trial. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977) (internal quotation marks omitted). The Court then held that the Double Jeopardy Clause applied in a case involving a "criminal contempt proceeding" concerning two defendant "linen supply companies." *Id.* at 565 n.1.

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[14] *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), which the government cites (at 15-16), is not to the contrary. There, the Court held that corporations cannot "plead an unqualified right to conduct their affairs in secret" under the Fourth Amendment in the face of an agency's "legitimate right to satisfy [itself] that corporate behavior is consistent with the law." 338 U.S. at 652. At most, *Morton Salt* holds that "corporations enjoy narrower rights to privacy" because of "the state's interest in investigating corporate wrongdoing." *Consolidated Edison Co. v. Pataki*, 292 F.3d 338, 348 (2d Cir. 2002). *Morton Salt* does not suggest (as the FCC contends) that corporations have no privacy interests at all.

Nor is it uncommon for constitutional protections that are designed to safeguard the interests of individuals also to apply to corporations. In addition to the Fourth and Fifth Amendments noted above, corporations can invoke rights under the First Amendment, *see First Nat'l Bank v. Bellotti*, 435 U.S. 765, 784 (1978), the Due Process Clause, *see Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U.S. 26, 28 (1889), the Equal Protection Clause, *see id.*; *County of Santa Clara v. Southern Pac. R.R. Co.*, 118 U.S. 394, 396 (1886) (statement of Waite, C.J.), and the Bill of Attainder Clause, *see Consolidated Edison*, 292 F.3d at 347. Even so, that corporations are not categorically excluded from claiming the protections of those provisions does not mean that they must be treated the same as individuals. *Cf. supra* note 14. Similarly, the Third Circuit's decision in this case does not require that the privacy interests of corporations be given the same weight as the privacy interests of individuals in applying Exemption 7(C) or its regulatory counterparts. *See supra* p. 19.

2. The government also argues (at 16-19) that the phrase "personal privacy" in Exemption 7(C) must refer only to natural persons because the same phrase appears in Exemption 6 and Exemption 6 protects only individuals. But it is far from settled that Exemption 6 excludes corporations. *See supra* Part I.A.2. On the contrary, the D.C. Circuit has stated that the "personal privacy" protections in

Exemption 6 applies to "private individuals *and companies.*" *Judicial Watch*, 449 F.3d at 152 (emphasis added).

As the government acknowledges (at 19 n.7), that reading of Exemption 6 comports with the Attorney General's interpretation of Exemption 6 shortly after the enactment of that provision. *See* U.S. Dep't of Justice, *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* (June 1967) ("*1967 FOIA Memorandum*"). Applying the same textual analysis as the court of appeals in this case, the Attorney General concluded that FOIA's language permitting agencies to redact identifying details from published documents, "[t]o the extent required to prevent a clearly unwarranted invasion of personal privacy," 5 U.S.C. § 552(a)(2), "would seem as applicable to corporations as to individuals," *1967 FOIA Memorandum* at 19. Turning to Exemption 6, the Attorney General likewise noted that "the applicable definition of 'person,' which is found in section 2(b) of the Administrative Procedure Act, would include corporations and other organizations as well as individuals." *Id.* at 36-37. The Attorney General also observed that "[t]he kinds of files referred to in [Exemption 6], however, would normally involve the privacy of individuals rather than of business organizations," *id.* at 37, thus recognizing, as did the court of appeals here, that generally "only individuals (and not corporations) may be the subjects of" personnel and medical files, Pet. App. 13a.[15]

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[15] As the government notes (at 19), a subsequent Attorney General's memorandum suggested that Exemption 7(C) does not protect corporations. That memorandum contains no significant reasoning on the issue, however, and instead simply asserts

In any event, as the court of appeals recognized, to the extent Exemption 6 does not protect corporations, it need not be because the phrase "personal privacy" excludes them. Instead, because Exemption 6 protects only "personnel and medical files and similar files," 5 U.S.C. § 552(b)(6) – the disclosure of which is highly likely to invade the privacy of individuals, but unlikely to invade the privacy of corporations – it might be reasonable to read the text of Exemption 6 as a whole as intended to be invoked only by natural persons. *See* Pet. App. 13a; *1967 FOIA Memorandum* at 36-37; *supra* Part I.A.2. That does not suggest that the phrase "personal privacy" means different things in the two provisions, but instead that Exemption 6 contains other language that could be read to limit its application to individuals.

CONCLUSION

The petition for a writ of certiorari should be denied.

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that Exemption 7(C) "does not seem applicable to corporations." U.S. Dep't of Justice, *Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act* 9 (Feb. 1975); *cf. Abramson*, 456 U.S. at 622 n.5 (criticizing a party for placing "undue emphasis" on the Attorney General's 1975 memorandum).

Respectfully submitted,

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REPLY
BRIEF

No. 09-1279

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, PETITIONERS

v.

AT&T INC. AND COMPTEL

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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AT&T INC. AND COMPTEL

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

REPLY BRIEF FOR THE UNITED STATES

For the first time in the 35-year history of FOIA Exemption 7(C), the court of appeals in this case held that corporate entities enjoy "personal privacy" under the exemption. That unprecedented decision creates a new and amorphous privacy concept that finds no support either in FOIA's text or the uniform body of case law and commentary that—until this case—instructed that FOIA's "personal privacy" provisions protect only the interests of individuals. Pet. 14-27. The court of appeals' holding will disrupt long-settled government procedures for processing large numbers of FOIA requests and induce forum-shopping by corporate litigants seeking to keep secret "records that are at the heart of FOIA's disclosure goal," Public Citizen Amicus Br. 6. See Pet. 27-30. And the decision will place substantial burdens on government agencies that collect information about corporations and corporate wrongdoing in the course of law-enforcement activities—information that has never previously been thought to be shielded from mandatory disclosure under FOIA.

Respondent AT&T (respondent) nonetheless contends that the court of appeals correctly read FOIA's "unambiguous[]" text, Br. in Opp. (Opp.) 22-31, and that review is unwarranted because the decision below does not create a conflict of authority, is interlocutory, and will have only an "insubstantial" impact on FOIA processing, Opp. 12-22. None of those contentions provides a reason to deny review.

1. The court of appeals fundamentally erred in its unprecedented extension of Exemption 7(C)'s "personal privacy" protection to corporate entities. Although "novelty is [not] always fatal in the construction of an old statute," *Keene Corp.* v. *United States*, 508 U.S. 200, 213 (1993), "[t]he presumption is powerful" that the reason that the court's newly minted interpretation of Exemption 7(C) was not "uncovered by judges, lawyers or scholars" for more than 35 years is "because it is not there." See *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 370-371 (1959). Respondent fails to offer even a scintilla of evidence that Congress, the Executive, the Judiciary, or any private entity ever previously thought that corporations could have "personal privacy" under Exemption 7(C). To the contrary, FOIA's legislative history confirms that Congress understood that the privacy exemption would not protect corporations. Pet. 18-19. Courts and legal scholars, including Professor Davis and then-Professor Scalia, unanimously confirmed that view. Pet. 19-22. And the federal government, in over 35 years of applying Exemption 7(C) to millions of FOIA requests, has never considered corporations to have "personal privacy" interests. Pet. 19, 27-28.

In the face of all this, respondent contends (Opp. 22) that "the 'plain text' of Exemption 7(C) 'unambiguously' applies to corporations" because it uses the term "personal privacy" and Congress defined the word "person" to include corporations. But respondent's own reasoning undermines its position. Respondent does not dispute that Congress will expressly extend statutory definitions (*e.g.*, person) to "variants" of the defined terms (*e.g.*, personal) when it intends such an extension. Pet. 23. And respondent cites nothing to support its reading in the interpretive rules of the Dictionary Act, 1 U.S.C. 1 *et seq.*, which apply to all legislation. Respondent instead relies (Opp. 22) on a dictionary definition of "personal"—*i.e*, "of or relating to a particular *person*," *Webster's Third New International Dictionary* 1686 (2002) (emphasis added)—to argue that, because the dictionary shows that "personal" refers to a "person," the word "personal" in Exemption 7(C) must share the same meaning as FOIA's special definition of "person." But that dictionary's use of "person" to define "personal" necessarily employs the dictionary's *own* understanding of "person," which is "an individual human being." See *ibid.* (defining "person"). The standard dictionary definitions of "personal" that respondent ignores, Pet. 14-15, confirm that conclusion. *Webster's* lexicographers clearly did not intend their own definitions to borrow whatever *non*-standard use that Congress might impose on the word "person" in special contexts.

Respondent notes (Opp. 23-24) that the Privacy Act, 5 U.S.C. 552a, protects only the privacy of "individuals," but that, too, confirms the court of appeals' error. Notwithstanding the Privacy Act's exclusive focus on privacy rights of "individuals," Congress referred to those rights in precisely the same way that it did in FOIA, declaring that the Privacy Act protects the "personal privacy" of "personal information" in agency records. See Privacy Act of 1974, Pub. L. No. 93-579, § 2(b), 88 Stat. 1896 (5 U.S.C. 552a note). The use of "personal privacy" in both FOIA and the Privacy Act reflects the established understanding that the phrase refers only to the privacy of individuals. See Pet. 15-16.

Respondent loses sight of the inescapable reality that a corporation exists only as a *legal* "person" in arguing (Opp. 24-25) that Exemption 7(C) prevents disclosure that may "embarrass, harass, or stigmatize" a corporation. Attempted personification aside, corporations do not experience any of those human reactions protected by "personal privacy" rights. "Any privacy interests that a corporation does possess" take the form of "property interests rather than intimate personal rights." Note, *Attorney-Client and Work Product Protection in a Utilitarian World*, 108 Harv. L. Rev. 1697, 1703 (1995) (footnotes omitted). And Congress specifically protected such interests for corporate "persons" under FOIA Exemption 4. Pet. 22. Respondent makes no attempt to reconcile its view of "personal privacy" with FOIA's more specific protections for business interests.

Nor does respondent dispute that if the court of appeals were correct that FOIA's definition of "person" governs the scope of "personal privacy," governments and governmental entities would also possess protected privacy interests under Exemption 7(C). Pet. 24-25 & n.11. Defining the scope of that novel and amorphous interest would raise exceedingly difficult problems never contemplated by Congress. Without guiding precedents or any indication of congressional intent, the scope of such organizational "privacy" would be exceedingly difficult to define. Moreover, corporations and governments exist to serve the interests of their shareholders and constituents in the public, yet Exemption

7(C) demands a balancing of such newly created organizational privacy interests against the interest of the public (including the same shareholders and constituents) in disclosure. Respondent makes no attempt to address such troubling implications of the court of appeals' decision, which leaves federal agencies with no basis for evaluating the new privacy interests it has created.

2. Respondent attempts to show that corporations have "personal" and "privacy" rights in various constitutional contexts (Opp. 27-29), but respondent's showing does not aid its cause. For instance, the concept of "personal jurisdiction" (Opp. 27) reflects a technical term of art that defines when a *court* may exercise jurisdiction over a defendant. Corporations are legal entities that may own property and may be sued, and a court may therefore have "personal jurisdiction" over a corporation. But that authority of a court is not "personal" in the same sense that an *individual* may possess "personal privacy."

Likewise, the limited Fourth Amendment protections that corporations enjoy (Opp. 28 & n.14) do not show that they experience "personal privacy." This Court has concluded that "[t]he businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property," *See* v. *City of Seattle*, 387 U.S. 541, 543 (1967), and has applied that right when such people conduct business under the corporate form. See *Dow Chem. Co.* v. *United States*, 476 U.S. 227, 236 (1986) (applying *See*); see also *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 311 (1978) (Fourth Amendment was intended to protect the "merchants and businessmen whose premises and products were inspected" by officials). But the limited corporate right against "unreasonable searches and seizures" of "houses, papers, and effects," U.S. Const. Amend. IV, does not suggest that corporations have their own "personal privacy" interests. Corporations do not have constitutional rights that are "purely personal." *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 778 n.14 (1978). This Court has thus declined to recognize non-derivative privacy interests of "collective entit[ies]" such as corporations in the Fifth Amendment context. See *Braswell* v. *United States*, 487 U.S. 99, 102, 104-105 (1988) (explaining that corporations are "'creature[s] of the State,' with powers limited by the State," and that, while individuals may assert their own right against self-incrimination concerning corporate matters, "corporate books and records are not 'private papers' protected by th[at] Fifth Amendment" right) (citation omitted).[1]

3. Respondent incorrectly suggests (Opp. 14-15, 29-30) that the D.C. Circuit has stated that corporations possess

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[1] Respondent's reliance on the Double Jeopardy Clause (Opp. 28) is equally unavailing. This Court has yet to address squarely whether corporations enjoy double-jeopardy protection. In *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 570-576 (1977), the Court assumed that they would without addressing the question, see *id.* at 570-576, and described the Clause's protection against "embarrassment" and a "continuing state of anxiety and insecurity" as part of the "*personal* strain which a criminal trial represents for the *individual* defendant." *Id.* at 569 (emphasis added); cf. U.S. Br. at 13 n.6, *Martin Linen*, *supra* (No. 76-120) (Government assumed application of the Double Jeopardy Clause and did not argue that the Clause "does not apply to corporations" because it did not raise the point below). If the Double Jeopardy Clause protects corporations from successive prosecutions, it would apply to advance the "'primary purpose'" of the Clause, namely, to "'protect the integrity' of final determinations of guilt or innocence," *Sattazahn* v. *Pennsylvania*, 537 U.S. 101, 120 (2003) (citation omitted), by preventing the government from "taking the question of guilt to a series of persons or groups empowered to make binding determinations," *Swisher* v. *Brady*, 438 U.S. 204, 216 (1978).

"personal privacy" under FOIA. In *Judicial Watch, Inc.* v. *FDA*, 449 F.3d 141 (D.C. Cir. 2006), the court of appeals held that the personal privacy of individuals—not corporations—warranted withholding under FOIA Exemption 6. In that case, the FDA withheld the names of "private individuals and companies" and the street addresses of businesses that had worked on approval of the controversial morning-after abortion drug, RU-486. *Id.* at 152. The government argued that employees of those companies had a privacy interest in withholding "the names and addresses of * * * businesses associated with [the drug]" in order to avoid potential "abortion-related violence." *Id.* at 153; see U.S. Br. at 39-43, *Judicial Watch*, *supra* (No. 05-5256), available at 2006 WL 515736 (arguing that "all of the withheld information," including business "street address[es]," can "be identified as applying to a particular individual" and implicate the "personal privacy interests of these employees"). The D.C. Circuit agreed that "individuals have a 'privacy interest in the nondisclosure'" to "avoid[] physical danger," and concluded that the government need not justify withholding on an "individual-by-individual basis" because the same "privacy interest extends to all such employees." 449 F.3d at 153 (citation omitted). The court thus held that Exemption 6 exempted the information from disclosure by balancing the private interest involved—"namely, the individual's right to privacy"—and concluding that the "private interest in avoiding harassment or violence tilts the scales" for nondisclosure. *Ibid.*

Even the court below recognized that *Judicial Watch* "considered only individuals' privacy interests." Pet. App. 14a n.6. The D.C. Circuit has thus since made plain, as it previously had, that "businesses themselves do not have protected privacy interests under Exemption 6." *Multi AG Media LLC* v. *USDA*, 515 F.3d 1224, 1228 (D.C. Cir. 2008);

see *Sims* v. *CIA*, 642 F.2d 562, 572 n.47 (D.C. Cir. 1980) ("Exemption 6 is applicable only to individuals."); *National Parks & Conservation Ass'n* v. *Kleppe*, 547 F.2d 673, 685 n.44 (D.C. Cir. 1976) ("The sixth exemption has not been extended to protect the privacy interests of businesses or corporations.").

Respondent asserts (Opp. 13-14) that the D.C. Circuit's Exemption 7(C) analysis does not yet reflect a square holding that rejects the concept of "personal privacy" for corporate entities. But respondent appears to agree that the case law establishes that "Exemptions 6 and 7(C) protect the same privacy interests," Opp. 17 n.8; see Pet. 20-21 & n.8, and respondent has failed to show that Exemption 6 decisions can be read to comport with the decision below. Cf. Pet. App. 14a n.6. Respondent asserts (Opp. 31) that the "personal privacy" protections of Exemption 6 would not apply to corporations because the exemption contains text not present in Exemption 7(C). That assertion reflects the Third Circuit's views, but it provides no response to our explanation of why those views do not withstand scrutiny. See Pet. 26.

4. Finally, respondent contends that review is unwarranted because the case is interlocutory (Opp. 20-21), and will not, in respondent's view, impose substantial burdens on agencies (Opp. 18-20). Neither contention counsels against review.

a. This Court's review of interlocutory decisions is appropriate when an "important" issue of law "is fundamental to the further conduct of the case," particularly where, as here, the "lower court's decision is patently incorrect" and "will have immediate consequences for the petitioner." Eugene Gressman et al., *Supreme Court Practice* 281 (9th ed. 2007) (citing cases). In *CIA* v. *Sims*, 471 U.S. 159 (1985), for instance, the Court granted certiorari notwithstanding the court of appeals' remand to the district court with instructions to "focus its inquiry on whether the [a]gency offered sufficient proof" to warrant application of Exemption 3. *Id.* at 166. This Court's review is even more appropriate here because, unlike *Sims*, the government in this case will have no right to seek further review after remand. The FCC "has no choice but to conduct its proceedings and to render its decision pursuant to th[e] standard" established by the Third Circuit, and, after the FCC acts on remand, it will be unable to seek judicial review of its own decision. See *Occidental Petroleum Corp.* v. *SEC*, 873 F.2d 325, 330 (D.C. Cir. 1989); see also Opp. 21 n.10 (acknowledging that the "FCC itself might be unable to seek review of its own decision").

The Court has previously granted the government's request for certiorari—even without a division of appellate authority—where, as here, the lower court's interpretation of Exemption 7(C) would have "important ramifications for law enforcement agencies, for persons about whom information has been complied, and for the general public." *FBI* v. *Abramson*, 456 U.S. 615, 621 (1982); see also *DOJ* v. *Reporters Comm. for Freedom of Press*, 489 U.S. 749, 762 (1989). In this case, the court of appeals' unprecedented expansion of Exemption 7(C)'s "personal privacy" protection to corporations threatens significant adverse consequences for law enforcement agencies that administer that exemption. Pet. 27-30. The decision also undermines the public's statutory right to records. Under the court of appeals' reasoning, information obtained by law-enforcement agencies, including agencies that may investigate BP's offshore drilling practices or Goldman Sachs' trading practices, could be withheld simply to protect a corporation from purported "embarrassment" or "stigma." That decision is clearly wrong and, if left unreviewed, will encourage corporate entities to engage in forum shopping to capitalize on the ruling. See Pet. 30.[2]

b. Respondent complains that the petition does not identify how many FOIA requests will be affected by the Third Circuit's decision and asserts that agency implementation of that ruling will not result in an "insufferable burden." Opp. 18-19. Respondent misunderstands the impact of the decision below.

Federal agencies—particularly regulatory agencies such as the Securities and Exchange Commission, Federal Trade Commission, Nuclear Regulatory Commission, and National Labor Relations Board (NLRB)—routinely collect information in the course of law enforcement investigations of corporations and other business organizations. The NLRB, for example, received 22,943 charges alleging unfair labor practices last year, see NLRB, *Annual Report of the National Labor Relations Board for the Fiscal Year Ended Sept. 30, 2009*, at 1 (2009), http://www.nlrb.gov/shared_files/Annual_Reports/NLRB2009.pdf, virtually all of which could contain information that a corporation might now claim, for the first time in the history of FOIA, is exempt from disclosure under Exemption 7(C) as "embarrassing."[3]

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[2] The decision has predictably prompted private practitioners to advise their clients that "companies should consider submitting" as "confidential" "information to regulators in connection with investigations," because "doing so could help the company to later challenge attempts by competitors or other third parties to obtain such information from the regulator under FOIA." Proskauer Rose LLP, *A Moment of Privacy* (Sept. 2009), http://www.proskauer.com/files/News/5c69eadf-9bb3-4f85-a60e-6a50db798e92/Presentation/NewsAttachment/eb7287f9-7216-4771-9fd7-6df986acdf3d/a-moment-of-privacy-september-2009.pdf; see also, *e.g.*, David T. Blonder, *Court Properly Protects Businesses' Privacy Rights in Context of FOIA Request*, Washington Legal Foundation (Dec. 11, 2009), http://www.akingump.com/files/Publication/21e08e03-67ed-48f8-a1d1-7baaf3b6bd47/Presentation/PublicationAttachment/33e90804-9ce6-44df-b791-7ecfef5db9c4/Blonder%20WLF%20Dec%202009.pdf.

The concept of personal privacy in Exemptions 6 and 7(C) "encompass[es] the individual's control of information concerning his or her person," *Reporters Committee*, 489 U.S. at 763 (Exemption 7(C)), and it therefore can cover even "publicly available" information such as that found in telephone directories. *DoD* v. *FLRA*, 510 U.S. 487, 497 n.6, 500 (1994) (following *Reporters Committee* in Exemption 6 context). For that reason, Exemptions 6 and 7(C) are the exemptions that apply, respectively, the most and next-most often to FOIA requests government-wide. U.S. Dep't of Justice, Office of Information Policy, *FOIA Post: Summary of Annual FOIA Reports for Fiscal Year 2009* (2010), http://www.justice.gov/oip/foiapost/2010foiapost18.htm. If the "personal privacy" of corporations is defined to be even remotely similar in scope, it will require a massive administrative effort to process and litigate the newly found "privacy" right. Requiring agencies to define the scope of and balance that new and amorphous right threatens to upset the legal regime that agencies have for decades used to process FOIA requests, substantially altering how the government processes a vast volume of such requests each year. Pet. 27-29.

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[3] The NLRB advises this Office that it expects that approximately 98% of its FOIA responses could implicate Exemption 7(C) as construed by the Third Circuit, based on its review of all FOIA requests from three randomly selected months in FY 2009.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

JULY 2010

AMICUS
CURIAE
BRIEF

Supreme Court, U.S.
FILED

MAY 24 2010

OFFICE OF THE CLERK

No. 09-1279

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Petitioners,
v.
AT&T INC. AND COMPTEL,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE* PUBLIC CITIZEN, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, THE NATIONAL SECURITY ARCHIVE, OPENTHEGOVERNMENT.ORG, THE ELECTRONIC FRONTIER FOUNDATION, AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF PETITIONERS

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May 2010

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are all organizations that promote openness and accountability in government and that rely on the Freedom of Information Act (FOIA) for their work. *Amici* are concerned that the decision below threatens the public's access to government records concerning agency oversight of corporate activity and diminishes government transparency.

Public Citizen is a non-profit consumer advocacy organization headquartered in the District of Columbia, with approximately 150,000 members and supporters nationwide. Public Citizen is active before Congress, administrative agencies, and courts throughout the country on a wide variety of issues, including government transparency and corporate accountability. Since its inception, Public Citizen has represented numerous public interest organizations, journalists, academics, and other individuals seeking to obtain information under the Freedom of Information Act (FOIA) and other open government laws. Over the past five years alone, Public Citizen has been involved in more than thirty open government cases.[2] Many of those cases involve records that pertain to corporations. In addition, Public Citizen and its members are frequent FOIA requesters on a wide variety of topics that implicate corporate activity. Accordingly, Public Citizen is concerned about the issues of government and corporate secrecy generally and in particular about an expanded notion of corporate privacy that could potentially allow information from investigations into corporate misconduct to be withheld from the public.

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of amicus Public Citizen's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than Public Citizen made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters of consent are being submitted concurrently.

[2] For a list of cases, see http://www.citizen.org/Page.aspx?pid=2698.

Citizens for Responsibility and Ethics in Washington (CREW) is a non-profit, non-partisan corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government agencies and officials and to ensure the integrity of those officials. As part of its research, CREW uses government records made available to it under FOIA. Currently, CREW has FOIA requests pending with multiple federal agencies on a wide range of issues, including, among other things, a request for documents that would shed light on the Environmental Protection Agency's oversight of a Dow Chemical plant polluting the Saginaw Bay and Lake Huron.

The National Security Archive is an independent, non-governmental research institute and library located at the George Washington University that collects and publishes declassified documents concerning United States foreign policy and national security matters obtained under FOIA. As part of its mission to broaden access to the historical record, the Archive is a leading user of FOIA. In addition, through litigation and public advocacy, it works to defend and expand public access to government information.

OpenTheGovernment.org is a coalition of consumer and good government groups, environmentalists, journalists, library groups, labor and others united to make the federal government a more open place in order to make us safer, strengthen public trust in government, and support our democratic principles.

The Electronic Frontier Foundation (EFF) is a non-profit public interest organization that examines the potential impact of cutting edge information technology on individual liberties and strives to inform the public about these issues. In support of its mission, EFF pursues FOIA requests that focus on, among other things, government collection and use of personal information about Americans and federal agencies' development and use of new information technologies. EFF makes information obtained through such requests available to the public, the media, and policymakers.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance, and research in First Amendment and freedom of information litigation since 1970.

BACKGROUND

1. The Freedom of Information Act, first enacted in 1966, was designed to "ensure an informed citizenry," which is "needed to check against corruption and to hold the governors accountable to the governed." *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). FOIA protects the public's right to know "what [its] government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749,

773 (1989). Understanding how agencies oversee the spending of public tax dollars and enforce laws and regulations is a core purpose of FOIA. *See U.S. Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994).

FOIA's requirement that agencies provide public records to "any person," upon request, 5 U.S.C. § 552(a)(3)(A), is tempered only by statutorily enumerated exemptions, which are to be construed "narrowly in favor of disclosure." *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 181 (1993). Accordingly, "disclosure, not secrecy, is the dominant objective of the Act." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

Certainly, important interests are protected by FOIA's exemptions, including the integrity of law enforcement investigations protected by exemption 7. *See* 5 U.S.C. § 552(b)(7). As originally enacted, courts construed exemption 7 to allow the government to withhold *any* law enforcement records, without requiring a showing that releasing the records would cause an identifiable harm. *See Center for Nat'l Policy Review on Race and Urban Issues v. Weinberger*, 502 F.2d 370, 372 (D.C. Cir. 1974) ("Since these files are 'investigatory files compiled for law enforcement purposes,' our duty is 'at an end.'").

Concerned about these decisions broadly construing exemption 7, Congress amended exemption 7 in 1974 to make clear that law enforcement records were only exempt when disclosure would interfere with certain enumerated interests. Relevant here, as amended in 1974, exemption 7(C) protects from mandatory disclosure law enforcement records the production of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

Senator Hart, who introduced the exemption 7 amendment on behalf of himself and 14 co-sponsors, explained why narrowing the exemption was necessary:

> Our concern is that, under the interpretation by the courts in recent cases, the seventh exemption will deny public access to information even previously available. For example, we fear that such information as meat inspection reports, civil rights compliance information, and medicare nursing home reports will be considered exempt under the seventh exemption.

120 Cong. Rec. 17,033 (1974) (statement of Sen. Hart), reprinted in House Committee on Government Operations, Senate Committee on the Judiciary, 94th Cong., *Freedom of Information Act & Amendments of 1974, Source Book: Legislative History, Texts, & Other Documents* (Joint Comm. Print) (1975). That is, Congress determined that disclosure of investigative records concerning various corporate activities was central to the functioning of FOIA as a disclosure statute and amended exemption 7 specifically to ensure public access to such records.

2. In 2005, CompTel submitted to the FCC a FOIA request for records obtained by the agency during the course of its investigation of AT&T for alleged overbilling of the government. Pet. App. 3a. When the FCC concluded that FOIA mandated the release of some of those records, AT&T sued FCC, claiming that the release would invade AT&T's "personal privacy." *Id.* 5a. Although up to that point exemption 7(C) had been applied only to records that concerned the personal privacy of human beings, the Third Circuit, in the decision below, concluded that this exemption could be invoked to allow

withholding of records that implicate the "personal privacy" of corporate entities. *See* Pet. App. 13a.

REASONS FOR GRANTING THE PETITION

I. The Third Circuit's Decision Undermines the Core Purpose of FOIA.

The decision below warps the concept of "personal privacy" in FOIA exemption 7 to cover the "privacy" interests of corporate entities, including those entities' potential feelings of "embarrassment" about their own conduct. Such a ruling permits a veil of secrecy to cover records that are at the heart of FOIA's disclosure goal, and directly contravenes Congress's purpose in amending exemption 7, which was, in part, to clarify that records concerning government oversight of industry are to be made freely available to the public.

Under the Third Circuit's reading, the very records that the 1974 amendments sought to bring outside the scope of exemption 7 are precisely the type of records that could be the subject of a corporate privacy claim under exemption 7(C). For example, the meat inspection reports such as those singled out by Senator Hart might be withheld under 7(C) on the theory that the meat processer's privacy rights would be invaded because of the public "embarrassment" the corporation might feel if its filthy processing plant conditions were known. *See* Pet. App. 14a n.5 (corporations can suffer "embarrassment"). But records concerning the government's oversight of meat processing and its response to a poor inspection result that a company might find "embarrassing" are records of significant importance to the public and fall within the core of FOIA's purpose.

Likewise, under the Third Circuit's view, nursing homes could claim a privacy interest in their Medicare reports—also mentioned in exemption 7's legislative history—and could therefore prevent or delay the public from accessing these records despite the public's undeniably strong interest in information that the companies might find embarrassing, such as how the government is responding to inadequate quality of care, insufficient staffing levels, or a poor health inspection. Indeed, knowing how the government regulates and monitors industries such as meat processing and health care is central to the purpose of FOIA.

Rather than to protect corporate privacy, Congress enacted exemption 7(C) to provide for "the protection for *personal* privacy" in law enforcement records, just as it had already protected personal privacy in other types of records under exemption 6. 120 Cong. Rec. at 17,033 (statement of Sen. Hart) (emphasis added). Even under the Third Circuit's rationale, exemption 6 would not cover so-called corporate privacy, *see* Pet. App. 13a, and exemption 7(c) "simply make[s] clear that the protections in the sixth exemption for personal privacy also apply to disclosure under the seventh exemption." 120 Cong. Rec. at 17,033 (statement of Sen. Hart).

In fact, Congress protected corporations' legitimate business interests separately in exemption 4, which exempts from disclosure trade secrets and confidential commercial and financial information. 5 U.S.C. § 552(b)(4). Exemption 4 is designed to "protect persons who submit financial or commercial data to government agencies from . . . competitive disadvantages." *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 768 (D.C. Cir. 1974). But courts have held that a competitive disadvantage is the "affirmative use of proprietary information by *competitors*... [and] should not be taken to mean simply any injury to competitive position, as might flow from . . . the embarrassing publicity attendant upon public revelations concerning, for example . . . violations of civil rights, environmental or safety laws." *Public Citizen Health Research Group v. Food and Drug Admin.*, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983). The Third Circuit's decision would allow companies to circumvent the limits on exemption 4 by shoehorning claims of embarrassment and fears of bad publicity into a "personal privacy" claim under exemption 7(C).

The error of the Third Circuit's interpretation of exemption 7 is evident in light of Congress's stated objective to give the public access to records revealing the operations of government with respect to its oversight of corporate activities. This Court should grant FCC's petition to prevent the Third Circuit's decision from impeding the functioning of FOIA.

II. The Question Presented in the Petition Is of Exceptional Importance to the Public.

FOIA is the public's strongest tool for holding government agencies accountable in the performance of their oversight and regulatory functions. Often when potential corporate wrongdoing becomes known, the media, public interest groups, and concerned members of the public submit FOIA requests to learn what the government is doing to investigate the wrongful activities and take enforcement action.

Recent events of national importance show how records obtained or created during government investigations into corporate activities can contain information that is crucial for the public to know. For instance, the investigation of Goldman Sachs concerns potential malfeasance that may have cost the taxpayers billions of dollars in bailout money.[3] Likewise, the BP oil rig explosion and resultant massive oil spill in the Gulf of Mexico, which has the potential to affect hundreds of thousands of residents and businesses, has already provoked government investigation.[4] And an investigation is underway as to the myriad alleged safety violations by Massey Coal that might be connected to the West Virginia mine explosion that took the lives of 29 mine workers.[5] The public has a strong interest in knowing how the government is responding to these crises, whether the response is adequate, and what more should be done.

If companies like Goldman Sachs, BP, and Massey Coal can interject a claim of corporate privacy into an exemption designed to recognize only "valid governmental and *individual* interests in confidentiality," then each time a request is made for records concerning newsworthy topics like the economic downturn, oil spill, and mine explosion, delay and withholding could result. 120 Cong. Rec. at 17,033 (statement of Sen. Hart) (emphasis added). For each request, if the Third Circuit's decision is not reversed, it is possible—even likely—that an agency would be sued by a company seeking to bar disclosure if the agency decides to release records that reflect unfavorable facts about a corporation under investigation, or that the agency would decide not to disclose records to avoid such a lawsuit.

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[3] *See, e.g.*, Louise Story & Gretchen Morgenson, *S.E.C. Accuses Goldman of Fraud in Housing Deal*, N.Y. Times (April 16, 2010), *available at* www.nytimes.com/2010/04/17/business/17goldman.html.

[4] *See, e.g.*, Elizabeth Shogren, *Cementing Becomes One Focus In Gulf Oil Probe*, National Public Radio (May 5, 2010), *available at* www.npr.org/templates/story/story.php?storyId=126536457.

[5] *See, e.g.*, *Feds Launch Investigation into Mine Explosion*, CBS News, (April 7, 2010), *available at* www.cbsnews.com/stories/2010/04/07/national/main6371864.shtml.

Currently, agencies routinely make available substantial amounts of information that *amici* are concerned companies will now seek to push within exemption 7(c) in light of the Third Circuit's rule. For instance, the Food and Drug Administration's Office of Regulatory Affairs (ORA), which describes itself as having "investigators" who "enforce [food and drug safety] laws," routinely posts inspection reports[6] and warning letters to companies about legal violations,[7] subject only to exemption 4 redactions. These records contain information a company may well find "embarrassing," such as the observation that a cheese manufacturer's "[p]lumbing constitutes a source of contamination to food, equipment, and utensils."[8] Similarly, the United States Department of Agriculture Food Safety and Inspection Services (FSIS) publishes a Quarterly Enforcement Report that lists various types of enforcement actions and names companies that have been subject to those actions.[9]

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[6] *See* ORA, Electronic Reading Room, http://www.fda.gov/AboutFDA/CentersOffices/ORA/ORAElectronicReadingRoom/default.htm.

[7] *See* FDA, Warning Letters, www.fda.gov/ICECI/EnforcementActions/WarningLetters/default.htm.

[8] Inspection report for Quesos Mi Pueblito, LLC, *available at* www.fda.gov/downloads/AboutFDA/CentersOffices/ORA/ORAElectronicReadingRoom/UCM198180.pdf.

[9] *See* FSIS, Quarterly Enforcement Reports, www.fsis.usda.gov/regulations_&_policies/Quarterly_Enforcement_Reports/index.asp.

Agencies also routinely release records in response to FOIA requests that could now be the subject of an exemption 7(C) dispute. For example, EPA did not make any sort of corporate privacy claim in response to a FOIA request for "notice letters" sent to corporations that were potentially liable for cleanup of hazardous wastes; but those letters might have been subject to exemption 7(C) withholding under the decision below. *See Cohen v. Environmental Protection Agency*, 575 F. Supp. 425 (D.D.C. 1983). Likewise, in *Aguirre v. Securities and Exchange Commission*, the SEC released, in response to a FOIA request, government records concerning a company's potentially unlawful trading practices, withholding under exemption 7(C) only information that pertained to individuals. 551 F. Supp. 2d 33, 47 (D.D.C. 2008). Had a claim of corporate privacy been available, the agency might have kept secret many more records that would have shown how the SEC failed properly to investigate the company. *See id.* at 56-57.

Amici themselves have made recent FOIA requests resulting in the release of records that, if the Third Circuit ruling had been implemented, might not have ever have come to light or might have been much harder to obtain. For example, after reports that Environmental Protection Agency regional administrator Mary Gade was asked to resign as a result of her strong stance concerning a Dow Chemical plant polluting the Saginaw Bay and Lake Huron,[10] Citizens for Responsibility and Ethics in Washington (CREW) made a FOIA request for records assessing or evaluating Dow Chemical's responsibility for dioxin, a pollutant, flowing into those bodies of water. CREW received voluminous records that shed light on EPA's response to Dow's actions, and some cast a negative light on Dow.[11] If exemption 7(C) covered corporations' "personal privacy," the agency likely would have withheld many of these important records.

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[10] *See* Stephen Power & Ana Campoy, *EPA Regional Chief Resigns After Dispute*, The Wall Street Journal A4 (May 3, 2008).

The volume of records that are now publicly available that might be the subject of a corporate privacy claim under the Third Circuit decision demonstrates the impact that the decision could have if it is allowed to stand. Certainly, as to each of these examples, if the agencies withheld records under exemption 7(C), they would have to demonstrate that these records were compiled for law enforcement purposes, and requesters, if they challenged the denials in court, might be able to demonstrate that the public interest in disclosure outweighs the privacy interest in the records. *See* 5 U.S.C. § 552(b)(7)(C). But claims of privacy under exemption 7(C) can be particularly difficult to overcome, thereby potentially diminishing requesters' ability to access such records. *See Nat'l Archives and Records Admin. v. Favish*, 541U.S. 157, 172 (2004) ("[T]he citizen must show that the public interest sought to be advanced is a significant one.").

Moreover, even if a court victory might eventually give the public access to these types of records, an agency's denial decreases access to public records. Often, requesters do not have the resources to litigate an agency's initial denial. In addition, because many records would no longer be useful if obtained only after years of litigation, requesters frequently do not pursue what would otherwise be meritorious FOIA cases. And even if a requester successfully litigates the claim, the agency's initial denial still results in greater expense for both the agency and requester and delay of the release of important records that Congress never meant to protect.

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[11] CREW posted the released records on its website. *See* CREW Files FOIA Requests with EPA, www.citizensforethics.org/node/31586.

Accordingly, the public's interest in the disclosure of records that are at the heart of the purpose of FOIA—informing the public about the operations of government—is threatened by the Third Circuit's decision. Whether exemption 7(C) should be expanded to potentially include vast swaths of records not previously considered exempt is of utmost importance to the public.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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May 2010

PETITIONER'S
BRIEF

No. 09-1279

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
PETITIONERS

v.

AT&T INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. 552(b)(7)(C), exempts from mandatory disclosure records or information compiled for law enforcement purposes when such disclosure could reasonably be expected to constitute an unwarranted invasion of "personal privacy." The question presented is:

Whether Exemption 7(C)'s protection for "personal privacy" protects the "privacy" of corporate entities.

PARTIES TO THE PROCEEDING

The petitioners are the Federal Communications Commission and the United States of America.

Respondent AT&T Inc. was the petitioner in the court of appeals. Respondent CompTel was an intervenor below.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 582 F.3d 490. The order of the Federal Communications Commission (Pet. App. 19a-33a) is reported at 23 F.C.C.R. 13,704.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 2009. A petition for rehearing was denied on November 23, 2009 (Pet. App. 45a-46a). On February 12, 2010, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including March 23, 2010. On March 15, 2010, Justice Alito further extended the time to April 22, 2010, and the petition was filed on that date. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Exemption 7(C) of the Freedom of Information Act exempts from mandatory disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information * * * (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). Other pertinent statutory and regulatory provisions are set out in the appendix to the petition for a writ of certiorari. Pet. App. 47a-60a.

STATEMENT

1. In July 1966, Congress enacted the Freedom of Information Act (FOIA), 5 U.S.C. 552, as an amendment to the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, to limit, subject to certain exemptions, the broad discretion that federal agencies previously had exercised concerning the publication of government records. *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 754 (1989) (*Reporters Committee*); FOIA, Pub. L. No. 89-487, 80 Stat. 250 (amending APA § 3); see Act of June 5, 1967, Pub. L. No. 90-23, § 1, 81 Stat. 54 (codifying FOIA at 5 U.S.C. 552). Under FOIA, federal agencies generally must make records available to "any person" who has submitted a "request for [such] records," unless a statutory exemption applies. See 5 U.S.C. 552(a)(3)(A); 5 U.S.C. 552(b) (FOIA exemptions); *Reporters Committee*, 489 U.S. at 754-755. If an agency fails to comply with its disclosure obligations within FOIA's statutory time limits, 5 U.S.C. 552(a)(6)(A) and (B) (2006 & Supp. III 2009), the requester may file an action in district

court to compel disclosure. 5 U.S.C. 552(a)(4)(B) and (6)(C).

Three FOIA exemptions, including Exemption 7(C), are relevant to this case.

First, Exemption 6 applies to "personnel and medical files and similar files" the disclosure of which "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). The "statutory goal" of Exemption 6 is to establish "a workable compromise between individual rights 'and the preservation of public rights to Government information.'" *Department of the Air Force* v. *Rose*, 425 U.S. 352, 372 (1976) (citation omitted). Congress designed the exemption to strike the "proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information." *United States Dep't of State* v. *Washington Post Co.*, 456 U.S. 595, 599 (1982) (quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966) (*1966 House Report*)); *DoD* v. *FLRA*, 510 U.S. 487, 495-496 (1994) (discussing "basic principles" governing FOIA).

Second, Exemption 7, as enacted in 1966, exempted "investigatory files compiled for law enforcement purposes" unless the files were "available by law to a party other than an agency." 5 U.S.C. 552(b)(7) (1970). After courts construed the exemption to cover "all material found in [such] investigatory file[s]," Congress narrowed Exemption 7 in 1974 by enumerating six specific categories of law-enforcement records that are exempt from mandatory disclosure. *FBI* v. *Abramson*, 456 U.S. 615, 627 & n.11 (1982). As relevant here, one category is encompassed by Exemption 7(C), which exempts from mandatory disclosure records or information compiled for law-enforcement purposes if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). "Congress gave special attention to the language in Exemption 7(C)," *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 166 (2004), and included its "protection for personal privacy" in order to "make clear that the protections in the sixth exemption for personal privacy also apply to disclosure under the seventh exemption." 120 Cong. Rec. 17,033 (1974) (statement of Sen. Hart).

Finally, Exemption 4 applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4). Because the exemption applies to information "obtained from a person," *ibid.*, and because the APA (which includes FOIA) defines the term "person" to include "an individual, partnership, corporation, association, or public or private organization other than [a federal] agency," 5 U.S.C. 551(2), Exemption 4 protects commercial and financial information that the government has obtained from a wide variety of sources, including private corporations and public organizations other than federal agencies. Cf. *Federal Open Mkt. Comm.* v. *Merrill*, 443 U.S. 340, 360 (1979). Exemption 4 was enacted to protect privileged and confidential material that "would not customarily be made public by the person from whom it was obtained," including "business sales statistics, inventories, customer lists," and "technical or financial data." *1966 House Report* 10.

"FOIA is exclusively a disclosure statute." *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 292 (1979). If one of its exemptions applies, FOIA does not forbid the agency from exercising its "discretion to disclose [the] information." *Id.* at 292-294. But in what is known as a "'reverse-FOIA' suit[]," *id.* at 285, a person seeking to prevent an agency's production of records may, in certain circumstances, seek judicial review under the APA of a final agency decision to disclose agency records. See *id.* at 317-318. In such a suit, a court may set aside an agency's decision to disclose if the agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. 706(2)(A). See *Chrysler Corp.*, 441 U.S. at 317-318 (reverse-FOIA suit alleging that disclosure of records was prohibited by the Trade Secrets Act, 18 U.S.C. 1905).

2. Federal agencies have adopted their own regulations to govern the handling of FOIA requests. As relevant here, the applicable Federal Communications Commission (FCC or Commission) regulations provide that a FOIA requester who seeks FCC records that are exempt from mandatory disclosure under FOIA must specify the "reasons for inspection and the facts in support thereof." 47 C.F.R. 0.461(c); see 47 C.F.R. 0.457. Under the Commission's regulations, if the records contain material submitted to the agency by a third person, the Commission will provide a copy of the FOIA request to that person and afford the person an opportunity to object to disclosure in certain specified circumstances: if the person previously requested that the records be kept confidential (47 C.F.R. 0.459); if the Commission has accepted the records on a confidential basis pursuant to FOIA Exemption 4 (see 47 C.F.R. 0.457(d)); or if the custodian of records has reason to believe that "the information may contain confidential commercial information." 47 C.F.R. 0.461(d)(3); cf. Exec. Order No. 12,600, §§ 1, 3-5, 8, 3 C.F.R. 235-237 (1988) (directing agencies to provide submitters of certain confidential

commercial information with notice of, and an opportunity to object to, agency disclosure).

If the Commission ultimately determines that FOIA requires disclosure of the requested records because no exemption from mandatory disclosure applies, the Commission will grant the FOIA request and produce the records. See 47 C.F.R. 0.457(f)(3). But if the Commission determines that the records fall within one of FOIA's exemptions and their "disclosure * * * is [not] prohibited by law," the Commission will proceed to "weigh the policy considerations favoring non-disclosure against the reasons cited for permitting inspection in light of the facts of the particular case," and will decide whether to exercise its authority to produce the records. 47 C.F.R. 0.457; see 47 C.F.R. 0.461(f)(4).

3. This case arises from a FOIA request for FCC records concerning an investigation involving respondent AT&T Inc.[1] AT&T participated in a federal program, the E-Rate Program, administered by the FCC and designed to improve access to advanced telecommunications technology by educational institutions. Pet. App. 2a. Under the E-Rate Program, AT&T provided equipment and services to elementary and secondary schools and billed the government for the cost. *Ibid.*

By letter dated August 6, 2004, AT&T informed the Commission that it had discovered "certain irregularities" that constituted an "apparent violation of the E-[R]ate rules," resulting in AT&T's over-billing the government for its services. C.A. App. A22; see Pet. App. 2a-3a. On August 24, 2004, the Commission's Enforcement Bureau (Bureau) issued a Letter of Inquiry to AT&T, notifying the company that the Bureau had initiated an investigation and ordering AT&T to produce information relevant to that investigation. *Id.* at 35a, 41a. AT&T produced the information as directed. *Id.* at 41a.

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[1] The FCC investigated actions taken by SBC Communications, Inc., which subsequently acquired AT&T Corp. and changed its name to AT&T Inc. See Pet. App. 19a n.1. To avoid confusion, this brief refers to that respondent as AT&T.

In December 2004, the Bureau terminated its investigation pursuant to an administrative consent decree. See *SBC Commc'ns, Inc.*, 19 F.C.C.R. 24,014 (Enf. Bur. 2004) (order and consent decree). Under that decree, AT&T, without admitting liability, agreed to pay $500,000 to the government and to institute a two-year compliance plan to ensure future compliance with pertinent FCC rules by all AT&T subsidiaries. *Id.* at 24,016-24,019; Pet. App. 35a-36a.

4. On April 4, 2005, respondent CompTel, a trade association representing some of AT&T's competitors, submitted a FOIA request to the Commission, seeking "[a]ll pleadings and correspondence contained in" the AT&T E-Rate investigation file. C.A. App. A27. The Commission notified AT&T of CompTel's FOIA request, and AT&T submitted an objection to disclosure. See *id.* at A28.

a. In August 2005, the Bureau granted CompTel's FOIA request in part and denied it in part. Pet. App. 34a-44a. The Bureau concluded that portions of the information submitted to the FCC by AT&T were protected from mandatory disclosure under FOIA Exemption 4 because those portions "constitute[d] commercial or financial information" that, if disclosed, "could result in substantial competitive harm to [AT&T]." *Id.* at 41a. Under Exemption 4, the Bureau declined to disclose "commercially sensitive information," including AT&T's "costs and pricing data, its billing and payment dates, and identifying information of [AT&T's] staff, contractors, and the representatives of its contractors and customers." *Id.* at 41a-42a. But because AT&T failed to explain the degree to which other information could be deemed "commercial or financial," how disclosing such information might "result in substantial competitive harm," or whether the information was "already available to the public," the Bureau concluded that the additional information could not be properly withheld as confidential commercial information under Exemption 4. *Id.* at 39a-40a.

The Bureau additionally determined that FOIA Exemption 7(C) protected from mandatory disclosure information in the agency's investigative file that would invade the personal privacy of AT&T's employees and customers. Pet. App. 42a-43a. The Bureau stated that it would therefore "withhold the names and identifying information of those individuals." *Id.* at 43a.

The Bureau, however, rejected AT&T's argument that Exemption 7(C) also protected from mandatory disclosure all other records that the FCC had obtained from AT&T during its investigation. Pet. App. 42a-43a. The Bureau concluded that records that do not implicate the privacy interests of individuals fall outside Exemption 7(C) because AT&T itself does "not possess 'personal privacy' interests" protected by that exemption. *Ibid.*

b. AT&T filed an administrative appeal from the Bureau's determination, challenging the decision to release the agency's investigative records that the Bureau concluded were subject to mandatory FOIA disclosure. C.A. App. A47; Pet. App. 22a & n.16. In September

2008, the Commission denied AT&T's administrative appeal. *Id.* at 19a-33a.[2]

As relevant here, the Commission rejected AT&T's argument that AT&T is a "corporate citizen" with "personal privacy" rights protected by Exemption 7(C), that AT&T should therefore be "protected from [a] disclosure that would 'embarrass' it," and that the FCC should accordingly withhold "all of the documents that [AT&T] submitted" to the FCC. Pet. App. 26a (citation omitted). The agency concluded that "established [FCC] and judicial precedent" demonstrated that the "personal privacy" protected under Exemption 7(C) concerns only the privacy interests of individuals, and corporations do not have "'personal privacy' interests within the meaning of [that] Exemption." *Id.* at 26a-28a.

The Commission explained that this Court's decision in *Reporters Committee* indicated that the "personal privacy" interest protected by both Exemption 6 and Exemption 7(C) is "applicable only to individuals," because *Reporters Committee* relied on Exemption 6 to construe Exemption 7(C) and, as AT&T "admit[ted]," "Exemption 6 applies only to individuals." Pet. App. 30a & n.46 (citing AT&T letter brief reproduced at C.A. App. A52). The Commission further reasoned that judicial decisions demonstrate that Exemption 7(C)'s purpose is to avoid damage to "personal reputation, embarrassment, and * * * harassment * * * that an individual might suffer from disclosure." *Id.* at 29a. Such harms, the Commission concluded, are distinct from the potential impact of disclosure on a purely "legal entity like a corporation." *Ibid.*

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[2] CompTel also filed an administrative appeal from the Bureau's determination. Pet. App. 22a & n.16. But after CompTel constructively exhausted its administrative remedies, see 5 U.S.C. 552(a)(6)(A)(ii) and (C)(i), it filed a FOIA action in the United States District Court for the District of Columbia. Pet. App. 23a & n.17. The Commission therefore did not address the merits of CompTel's administrative appeal. *Ibid.*

The district court subsequently stayed CompTel's FOIA action. See Pet. App. 23a & n.19. The district court explained that AT&T had intervened to assert a reverse-FOIA claim against the FCC, but that APA review was not yet available on that claim because the FCC had yet to take a "final agency action" subject to review. *CompTel* v. *FCC*, Civ. No. 06-1718 (D.D.C. Mar. 5, 2008), slip op. 4 (citing 5 U.S.C. 704). The district court reasoned that judicial economy warranted a stay until "there is a final agency action on AT&T's intra-agency appeal," in order to "permit[] the court to simultaneously address the issues raised by [all parties]." *Id.* at 6. CompTel's FOIA case remains stayed and does not affect the question presented here.

The Commission thus did "not have authority to withhold the records," 47 C.F.R. 0.461(f)(3), based on its conclusion that Exemption 7(C) did not apply to (and that FOIA therefore compelled disclosure of) the agency records that the Bureau ordered released. The Commission accordingly affirmed the Bureau's decision to grant CompTel's FOIA request in part. Pet. App. 32a-33a. Because the Commission found Exemption 7(C) inapplicable, it did not decide whether, if the Exemption were applicable, it might nonetheless decline to exercise regulatory "authority to withhold the records from public inspection." 47 C.F.R. 0.461(f)(4); see 47 C.F.R. 0.457.

5. The court of appeals granted AT&T's petition for review under the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.*, and remanded for further agency proceedings. Pet. App. 1a-18a.[3]

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[3] The Hobbs Act vests the courts of appeals with exclusive jurisdiction over petitions for review of certain agency orders. 28 U.S.C. 2342. The "nature and attributes of judicial review" under the Hobbs Act are governed by the APA's judicial-review provisions. *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987); see *id.* at 277 (citing APA standard of review in 5 U.S.C. 706(2)(A)).

The court of appeals held, in pertinent part, that "FOIA's text unambiguously indicates that a corporation may have a 'personal privacy' interest within the meaning of Exemption 7(C)." Pet. App. 13a; see *id.* at 9a-14a. The court reasoned that "FOIA defines 'person' to include a corporation" and that the term "personal" is "derived" from the word "person" and is simply the "adjectival form" of that defined term. *Id.* at 10a-12a (discussing APA definition at 5 U.S.C. 551(2)). In light of that conclusion, the court rejected the contention that the statutory phrase "personal privacy" should be construed to reflect the "ordinary meaning" of the word "personal." *Id.* at 12a.

The court of appeals assumed *arguendo* that FOIA's protection for "personal privacy" in Exemption 6 "applies only to individuals (and not to corporations)," but decided that this assumption did not undermine its understanding of the scope of "personal privacy" protected by Exemption 7(C). Pet. App. 13a. The court reasoned that Exemption 6 expressly applies to "personnel and medical files," 5 U.S.C. 552(b)(6), and that particular statutory phrase "limits Exemption 6 to individuals because only individuals (and not corporations) may be the subjects of such files." Pet. App. 13a.

Consistent with the government's position, the court of appeals concluded that it possessed Hobbs Act jurisdiction over this reverse-FOIA action because AT&T's suit challenged an "order of the Commission under [the Communications Act of 1934, 47 U.S.C. 151 *et seq.*]," 47 U.S.C. 402(a). See Pet. App. 6a-7a. The court of appeals explained that AT&T's challenge to the Commission's order regarding disclosure based on that order's alleged inconsistency with FCC regulations was a challenge subject to Hobbs Act review, see 28 U.S.C. 2342(1), and that "[c]ourts have consistently held that an [FCC] order" allegedly violating FCC regulations is subject to such review. Pet. App. 7a & n.2.

Having concluded that "FOIA's text unambiguously" resolved the case, the court of appeals declined to "consider the parties' arguments concerning statutory purpose, relevant (but non-binding) case law, and legislative history." Pet. App. 13a-14a. The court nevertheless expressed the view that its interpretation advanced Exemption 7(C)'s purpose by providing privacy protection to corporations because, as the court saw it, "[c]orporations, like human beings, are routinely involved in law enforcement investigations" and, "like human beings, face public embarrassment, harassment, and stigma because of that involvement." *Id.* at 14a n.5. The court also expressed the view that D.C. Circuit decisions indicating that the protections for privacy in Exemptions 6 and 7(C) apply to "individuals only" were based on atextual considerations that did "not impugn [the Third Circuit's] textual analysis." *Id.* at 14a n.6.

The court of appeals declined to examine how "AT&T's 'personal privacy'" should be balanced against any public interest in disclosure, explaining that the Commission had not conducted such balancing under Exemption 7(C) in the first instance. Pet. App. 15a-16a. The court accordingly "remand[ed] the matter to the FCC with instructions to determine" whether the requested "disclosure 'could reasonably be expected to constitute an unwarranted invasion of personal privacy.'" *Id.* at 17a (quoting 5 U.S.C. 552(b)(7)(C)); *cf. id.* at 7a & n.2 (indicating that FCC regulations governing the agency's processing of FOIA requests contemplate that determination).

SUMMARY OF ARGUMENT

The court of appeals has held that FOIA's statutory protection for "personal privacy" in Exemption 7(C) extends beyond the privacy interests of individuals and protects the so-called privacy of corporate entities. That holding is inconsistent with the text of Exemption 7(C), FOIA's broader context, and the statute's drafting history, all of which make clear that Congress intended the Exemption to protect individuals, not corporations. The court of appeals' decision is itself a singular outlier in an otherwise uniform body of more than 35 years of decisional law and commentary. The Third Circuit's rationale would lead to highly anomalous results by granting "personal privacy" protections not only to corporations but also to state, local, and foreign governmental entities. Nothing suggests Congress intended FOIA's protection for "personal privacy" to extend to such unprecedented contexts.

1. a. Exemption 7(C)'s text and FOIA's broader context demonstrate that corporations do not possess "personal privacy." The compound phrase "personal privacy" has long been understood to refer only to the privacy of individuals. The term "personal" traditionally refers to matters that relate to a particular individual human being and, when joined with the word "privacy," the resulting statutory phrase invokes background principles that relate exclusively to individuals. Indeed, it is well settled that corporations have no right to "personal privacy," which only individuals enjoy. And while the law protects matters such as the name and business prestige of corporate entities, those protections reflect derivative and property rights that preserve the business—not "personal"—interests of corporations.

b. FOIA's broader structure confirms that understanding. Exemption 7(C)'s protection for "personal privacy" in the law-enforcement-record context took its text directly from Exemption 6, which Congress enacted in 1966 to more generally protect "personal privacy" under FOIA. Exemption 6's drafting history makes clear that Congress intended the exemption to protect the privacy of individuals only, and this Court has itself held that the text of Exemption 6 requires courts to balance the *individual*'s right of privacy against any public interest in disclosure. Congress's use of the exact same phrase in Exemption 7(C) should be given an equivalent meaning. Indeed, the Congress that passed Exemption 7(C) would have recognized, based on the existing law and commentary, that that statutory phrase would protect only individuals and not corporations.

FOIA Exemption 4 likewise demonstrates that Exemption 7(C) does not protect the interests of corporations. Congress enacted Exemption 4 to safeguard from public disclosure the "trade secrets" and "confidential" commercial and financial information that the government receives from corporations. Had Congress intended Exemption 7(C) to extend similar protections, it presumably would have used similar language to identify the sorts of information that a corporation might normally keep secret or confidential.

2. Exemption 7(C)'s drafting history confirms that conclusion. The Exemption originated as an amendment to extend Exemption 6's "personal privacy" protections to the law-enforcement context and, in the ensuing debate, it became apparent that Exemption 6 did not protect corporate interests. Congress's debates on Exemption 7(C) accordingly focused exclusively on the privacy rights of individuals, with nothing suggesting analogous protection for corporate interests.

3. In the more than 35 years since the 1974 enactment of Exemption 7(C), courts and commentators have consistently concluded that the Exemption protects only

individuals, not corporations. The Executive Branch has applied that understanding in processing millions of FOIA requests; courts have confirmed that approach; and scholarly commentators have made clear that Exemption 7(C)'s protection extends only to individuals.

4. The court of appeals erred in holding that the phrase "personal privacy" in FOIA departs from its well-settled meaning. In the court's view, FOIA's text "unambiguously" demonstrates that corporations have "personal privacy" because the APA defines "person" to include corporations and that "defined term" is "the root from which the statutory word at issue [(personal)] is derived." Pet. App. 12a-13a. That analysis does not withstand scrutiny.

The APA's definition of "person" is irrelevant here because Congress did not use that term in Exemption 7(C). Had Congress intended to invoke a statutory definition of "person," it would have drafted text to protect "the privacy of any person." Congress did so in FOIA's other exemptions when it wanted to protect corporate entities from potential harms from FOIA disclosures, and its decision not to follow that course in Exemption 7(C) should be given full effect. When Congress specifically intends to extend a statutory definition to related "variants" of a defined term, it enacts text to make that intent clear. See, *e.g.*, 15 U.S.C. 3802(f). And without such a statutory instruction, the phrase "personal privacy" must be construed in its proper context. The placement and purpose of Exemption 7(C) in FOIA's framework plainly shows that "personal privacy" concerns the interests of individuals, not corporations.

5. The logical implications of the Third Circuit's analysis underscore its error. The APA's definition of

"person" includes not only corporations but also state, local, and foreign governmental entities, all of which would possess "personal privacy" under the court's flawed rationale. Reading Exemption 7(C) to confer a new and amorphous "privacy" right upon such entities would lead to highly anomalous results. There are no meaningful benchmarks to guide the federal agencies and the courts in defining the limits of that wholly non-intuitive interest. Had Congress intended that exceptional result, it surely would have given at least some indication that it intended such an extraordinary exercise of policy-making authority and supplied some framework for doing so. But all indicators point in the precisely the opposite direction: They demonstrate that "personal privacy" carries its ordinary meaning and protects only the privacy of individuals.

ARGUMENT

EXEMPTION 7(C)'S PROTECTION FOR "PERSONAL PRIVACY" SAFEGUARDS THE INTERESTS OF INDIVIDUALS, NOT CORPORATIONS

FOIA Exemption 7(C) exempts from mandatory disclosure records or information compiled for law enforcement purposes that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). The text of Exemption 7(C), FOIA's broader context, and the statute's drafting history make clear that Congress intended the Exemption to protect individuals, not corporations. Indeed, until the decision under review, that conclusion was uniformly accepted: Neither the court below nor AT&T has cited any court, agency, or commentator in the more than 35 years of Exemption 7(C)'s existence that has ever concluded that corporations can invoke the Exemption's protection for "personal privacy." The court of appeals' novel construction would erroneously create a new and amorphous "privacy" right not only for corporations but also for local, state, and foreign governments. It would also leave federal agencies and courts with no meaningful benchmarks against which to measure whether any invasion of that unprecedented "privacy" interest would be "unwarranted." This Court should reverse the decision of the court below and confirm that Exemption 7(C)'s protection for "personal privacy" protects only the privacy of individuals.

A. FOIA's Text Demonstrates That Exemption 7(C) Protects Only The Privacy Interests Of Individuals

The meaning of the phrase "personal privacy" in Exemption 7(C) "turns on 'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *Nken* v. *Holder*, 129 S. Ct. 1749, 1756 (2009) (quoting *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997)). Those basic interpretive guides each demonstrate that Exemption 7(C)'s protection for "personal privacy" extends only to individuals.

1. The term "personal privacy" itself encompasses only the privacy of individual human beings

FOIA does not define the phase "personal privacy." When such a term is "left undefined by the statute," it "carries its ordinary meaning." *Crawford* v. *Metropolitan Gov't of Nashville & Davidson Co.*, 129 S. Ct. 846, 850 (2009); see also *Smith* v. *United States*, 508 U.S. 223, 228 (1993). The ordinary meaning of "personal privacy" is one that encompasses only the privacy of individual human beings.

Dictionaries demonstrate that the conventional meaning of the word "personal" is (1) "of or relating to a particular person," *i.e.*, a particular "individual human being"; (2) "affecting one individual or each of many individuals"; (3) "relating to an individual"; or (4) "relating to or characteristic of human beings as distinct from things." *Webster's Third New International Dictionary* 1686 (1961); *ibid.* (defining "person" to mean "an individual human being"); see *The American Heritage Dictionary of the English Language* 978 (1976) ("personal" means "[o]f or pertaining to a particular person; private; one's own: *personal affairs*," and "[c]oncerning a particular individual and his intimate affairs"). Under those definitions, the characteristics of a corporation, in contrast to those of an individual, would not commonly be understood to be "personal" traits.

When "personal" is joined with the word "privacy" in Exemption 7(C), the resulting statutory phrase invokes background principles that focus exclusively on individuals. The law ordinarily protects personal privacy to safeguard human dignity and preserve individual autonomy. See generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 197-199, 205-207, 213-214 (1890), cited in *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 n.15 (1989) (construing Exemption 7(C)). Such concepts do not translate to a corporation, which "exist[s] only in contemplation of law" as "an artificial being, invisible, [and] intangible." *Trustees of Dartmouth Coll.* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819) (Marshall, C.J.). Artificial entities like corporations cannot experience the emotions (*e.g.*, embarrassment, annoyance, shame, or stigma) that are at the heart of what personal privacy is all about. Such emotions are unique to individuals.

It therefore is well established that a "corporation * * * has no personal right of privacy," Restatement (Second) of Torts § 652I cmt. c (1977) (Restatement) (torts based on invasions of privacy), and, for at least half a century, it has been "generally agreed that the right to privacy is one pertaining only to individuals." William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 408-409 & n.207 (1960) (citing cases); see, *e.g.*, *Warner-Lambert Co* v. *Execuquest Corp.*, 691 N.E.2d 545, 548 & n.6 (Mass. 1998) (explaining that "[c]ases from other jurisdictions unanimously deny a right of privacy to corporations"). In other words, "[a] corporation * * * can have no personal privacy" because the "right of privacy" is "a personal one," unique to human beings. William L. Prosser, *Law of Torts* § 97, at 641-642 (2d ed. 1955) (*Prosser*).[4]

The law, of course, will recognize a corporation's right to control and protect matters such as "its name and business prestige," *Prosser* § 97, at 642, but those protections reflect derivative protections for *property* rights that preserve the economic—not "personal"—interests of businesses. See Restatement § 652I cmt. c (protections derive from "the law of unfair competition"). Any so-called "privacy" interests that a corporation enjoys thus take the form of "property interests rather than intimate personal rights." See Note, *Attorney-Client and Work Product Protection in a Utilitarian World*, 108 Harv. L. Rev. 1697, 1703 (1995) (footnotes omitted); see also *Maysville Transit Co.* v. *Ort*, 177 S.W.2d 369, 370 (Ky. 1944) (holding that company may seek damages for injuries to its business or good will but cannot assert a "right to privacy" because "such a right is designed primarily to protect the feelings and sensibilities of human beings, rather than to safeguard property, business or other pecuniary interests").

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[4] Accord William L. Prosser, *Law of Torts* § 117, at 814-815 (4th ed. 1971); William L. Prosser, *Law of Torts* § 112, at 843 (3d ed. 1964).

2. FOIA's broader structure confirms that "personal privacy" protects individual, not corporate, interests

FOIA's broader structure likewise demonstrates that Exemption 7(C)'s protection for "personal privacy" applies only to individuals. First, Congress incorporated the phrase "personal privacy" into Exemption 7(C) directly from Exemption 6, which applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). The statutory protection for "personal privacy" in Exemption 6 has long been recognized as safeguarding the privacy interests only of individuals, and Congress's use of the identical term in Exemption 7(C) carries the same meaning. Second, Congress specifically addressed the legitimate need of corporations and other entities to maintain the confidentiality of "trade secrets" and "commercial or financial information" that they provide to the government in Exemption 4, 5 U.S.C. 552(b)(4). The text of that Exemption sharply contrasts with that of Exemptions 6 and 7(C), reinforcing the conclusion that Congress never intended Exemption 7(C) to provide an independent basis for withholding government records concerning corporations.

a. Exemption 6

1. When Congress enacted Exemption 6 in 1966, it made clear that it exempted agency records to exempt disclosures that "might harm the *individual*" and that the exemption's use of the phrase "'clearly unwarranted

invasion of personal privacy' provides the proper balance between the protection of an *individual's* right to privacy and the preservation of the public's right to government information." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966) (*1966 House Report*) (emphasis added). Congress thus specifically designed Exemption 6's protection for "personal privacy" to safeguard an "*individual's* private affairs from unnecessary public scrutiny." S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965) (*1965 Senate Report*); see also *Department of the Air Force* v. *Rose*, 425 U.S. 352, 372 (1976) (discussing both committee reports).

Indeed, this Court has specifically held that "the *text* of [Exemption 6]" itself "requires the Court to balance 'the *individual's* right of privacy' against the basic policy of opening 'agency action to the light of public scrutiny.'" *United States Dep't of State* v. *Ray*, 502 U.S. 164, 175 (1991) (quoting *Rose*, 425 U.S. at 372) (emphasis added). The Court has therefore emphasized that Exemption 6's "statutory goal" is to establish "a workable compromise between *individual* rights 'and the preservation of public rights to Government information,'" *Rose*, 425 U.S. at 381 (citation omitted; emphasis added), with the "primary purpose" of the Exemption being "to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *United States Dep't of State* v. *Washington Post Co.*, 456 U.S. 595, 599 (1982); see *id.* at 601 (explaining that Congress sought to protect an "'individual's right of privacy' * * * by preventing 'the disclosure of [information] which might harm the individual'") (quoting *1966 House Report* 11) (brackets in original). Under Exemption 6, then, the process of determining whether a disclosure could result in a "clearly unwarranted" invasion of "personal privacy" "require[s] a balancing of the individual's right of privacy against" the public interest in disclosure. *Rose*, 425 U.S. at 372; accord *DoD* v. *FLRA*, 510 U.S. 487, 495-496 (1994) (following *Rose*).

2. It is well established that "identical * * * phrases within the same statute should normally be given the same meaning." *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007). That interpretive rule has particular force here, because Congress incorporated the phrase "personal privacy" into Exemption 7(C) directly from Exemption 6 in 1974 in order to "make clear that the protections in the sixth exemption for personal privacy also apply to disclosure under" Exemption 7. 120 Cong. Rec. 17,033 (1974) (statement of Sen. Hart); cf. *FBI* v. *Abramson*, 456 U.S. 615, 627 n.11 (1982) (discussing Senator Hart's role as "the sponsor of the 1974 amendment"). It follows that the phase "personal privacy" in Exemption 7(C) has the same meaning as the identical phrase in Exemption 6 and protects only an "individual's right of privacy" (*Ray*, 502 U.S. at 175 (citation omitted)) from unwarranted invasions.

The Congress that drafted Exemption 7(C) would have recognized that, as in Exemption 6, its use of "personal privacy" would protect only individuals from unwarranted invasions of their privacy. Exemption 6's focus on the interest of real persons was clearly established in 1974. As noted above, the committee reports in both Houses of Congress concerning the enactment of FOIA in 1966 made plain that Exemption 6 protected an "individual's right to privacy" by shielding the "individual's private affairs" from unnecessary public scrutiny. See pp. 20-21, *supra* (quoting reports). And by 1970, the leading treatise on administrative law and FOIA had concluded that "a corporation cannot claim 'personal privacy'" under Exemption 6 because the phrase "'personal privacy' always relates to individuals." Kenneth Culp Davis, *Administrative Law Treatise* § 3A.22, at 163-164 (1970 Supp.); see John A. Hoglund & Jonathan Kahan, Note, *Invasion of Privacy and the Freedom of Information Act: Getman* v. *NLRB*, 40 Geo. Wash. L. Rev. 527, 540 (1972) (emphasizing that "the interest exemption 6 seeks to safeguard is that of individual privacy"); *id.* at 529-530 & nn.19-20 (examining legislative history); Gregory L. Waples, Note, *The Freedom of Information Act: A Seven-Year Assessment*, 74 Colum. L. Rev. 895, 954 n.323 (1974) (explaining that the statute's definition of "person," which includes corporations, does not suggest that "a corporation has a 'personal privacy' within the meaning of the sixth exemption"; stating that "it is difficult to perceive how a corporation could invoke" Exemption 6's protections).

Courts similarly had emphasized that the "personal privacy" referred to in Exemption 6 protected the privacy of individuals. Based on the "statute and its legislative history," the lower courts had determined that the Exemption required a balancing of "the potential invasion of individual privacy" against "a public interest purpose for disclosure of [the] personal information." *Wine Hobby USA, Inc.* v. *IRS*, 502 F.2d 133, 136 & n.12 (3d Cir. 1974) (quoting *Getman* v. *NLRB*, 450 F.2d 670, 677 n.24 (D.C. Cir. 1971)); accord *Rural Hous. Alliance* v. *USDA*, 498 F.2d 73, 77 & n.13 (D.C. Cir. 1974) (Exemption 6 is "designed to protect individuals from public disclosure of intimate details of their lives"); *Getman*, 450 F.2d at 674 & n.10 (Exemption 6 protects "the right of privacy of affected individuals"). Indeed, in March

1974, the Second Circuit made clear—in a passage that this Court would later adopt as part of its Exemption 6 holding in *Rose*—that the "statutory goal of Exemption Six" is "a workable compromise between individual rights 'and the preservation of public rights to Government information.'" *Rose* v. *Department of the Air Force*, 495 F.2d 261, 269 (citation omitted), aff'd, 425 U.S. 352, 381 (1976) (incorporating quoted text as part of this Court's holding in *Rose*).

This Court "can assume that Congress legislated against this background of law, scholarship, and history * * * when it amended Exemption 7(C)" in November 1974. *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 169 (2004). Indeed, this Court has emphasized that "Congress gave special consideration to the language in Exemption 7(C)" when it borrowed and modified the text of Exemption 6. *Id.* at 166; see pp. 27-32, *infra*. Against the existing legal background, the Congress that enacted Exemption 7(C) would have concluded that the "personal privacy" protections that it adopted would apply to protect only the privacy of individual human beings, not corporate entities.

b. *Exemption 4*

The conclusion that Exemption 7(C), like Exemption 6, is focused exclusively on the privacy interests of individuals is reinforced by the broader structure of FOIA. Corporations do have a legitimate interest in preserving the confidentiality of certain information, but Congress addressed that need in 1966 through a specific and circumscribed exemption: Exemption 4.

Congress enacted Exemption 4 to protect from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4). That exemption applies when the government has "obtained from" a non-agency "person" (*ibid.*) the specified categories of information. See *Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 360 (1979). And because the APA (which includes FOIA) defines the statutory term "person" to include "an individual, partnership, corporation, association, or public or private organization other than [a federal] agency," 5 U.S.C. 551(2), the exemption specifically protects "trade secrets" and confidential "commercial or financial information" that the government obtains from private corporations like AT&T. See generally Steven G. Breyer et al., *Administrative Law and Regulatory Policy: Problems, Text, and Cases* 876 (5th ed. 2002) (Exemption 4 reflects Congress's purpose of ensuring that FOIA be used to "ensure citizen scrutiny of the federal government rather than to open private businesses to public scrutiny.").

Exemption 4 protects such information as "business sales statistics, inventories, customer lists," and "technical or financial data," when a corporation voluntarily provides the government with such information and "would not customarily" make it available to the public. See *1966 House Report* 10; see also *1965 Senate Report* 9; *Critical Mass Energy Project* v. *NRC*, 975 F.2d 871, 872, 879 (D.C. Cir. 1992) (en banc), cert. denied, 507 U.S. 984 (1993). The lower courts have also construed Exemption 4 to apply where disclosure of confidential commercial or financial information that the government has required a person to submit would likely "impair the Government's ability to obtain necessary information in the future" or "cause substantial harm to the competitive position of the person from whom the information was obtained." *Id.* at 873, 878 (citation omitted); *id.* at

876 (citing decisions from courts of appeals); see *Utah* v. *United States Dep't of the Interior*, 256 F.3d 967, 969 (10th Cir. 2001); *Frazee* v. *United States Forest Serv.*, 97 F.3d 367, 371-372 (9th Cir. 1996); *Nadler* v. *FDIC*, 92 F.3d 93, 95-96 & n.1 (2d Cir. 1996); see also Pet. App. 40a-41a.[5]

Congress's enactment of a specific exemption for trade secrets and confidential commercial and financial information (Exemption 4) at the same time that it adopted a general exemption for "personal privacy" (Exemption 6) strongly indicates that Congress's subsequent incorporation of Exemption 6's "personal privacy" protection into Exemption 7's law-enforcement context was not intended to protect the business interests of corporations. Had Congress intended its enactment of Exemption 7(C) in 1974 to enhance FOIA's protections for the confidentiality interests of corporations and other entities, it presumably would have employed language similar to that used in Exemption 4—such as "trade secrets" or "confidential" "commercial or financial information"—that identifies the sorts of information that corporations normally keep secret or confidential. Its failure to do so strongly suggests that Congress never intended Exemption 7(C) to serve that function and, instead, enacted its protections for "personal privacy" to safeguard only the privacy of individuals.

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[5] Some courts of appeals have indicated that Exemption 4 may apply where public disclosure of commercial or financial information would undermine the effectiveness of a governmental program. See *Critical Mass Energy Project*, 975 F.2d at 879 (noting this ground); *9 to 5 Org. for Women Office Workers* v. *Board of Governors of the Fed. Reserve Sys.*, 721 F.2d 1, 11 (1st Cir. 1983). But see *Bloomberg, L.P.* v. *Board of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 150-151 (2d Cir. 2010) (rejecting similar grounds for withholding), petition for cert. pending, No. 10-543 (filed Oct. 26, 2010).

B. Exemption 7(C)'s Drafting History Demonstrates That Congress Protected Only The Privacy Interests Of Individuals

The drafting history of the 1974 amendments to FOIA further demonstrates that the Congress that enacted Exemption 7(C) understood that the Exemption's protection of "personal privacy" in records compiled for law-enforcement purposes would apply only to individuals. Nothing in that history supports the view that Exemption 7(C) contains the sweeping protection of corporate "privacy" that the court of appeals envisioned.

1. Congress amended several aspects of FOIA in 1974. See *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 226 (1978) (*Robbins Tire*). As relevant here, Congress amended Exemption 7, which had previously applied to "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." 5 U.S.C. 552(b)(7) (1970). The 1974 amendment revised that exemption to protect "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would," *inter alia*, "(C) constitute an unwarranted invasion of personal privacy." Act of Nov. 21, 1974, Pub. L. No. 93-502, § 2(b), 88 Stat. 1563; see 5 U.S.C. 552(b)(7) (1976); cf. *Abramson*, 456 U.S. at 626-627 (discussing the 1974 modifications to Exemption 7). That amendment resulted from a May 1974 proposal on the floor by Senator Hart during the Senate's debate of the FOIA amendment bill that Congress later enacted. *Robbins Tire*, 437 U.S. at 227; see 120 Cong. Rec. at 17,033 (Amendment No. 1361).

Senator Hart's proposal would have exempted records compiled for law-enforcement purposes if their disclosure would "constitute a clearly unwarranted invasion of personal privacy." 120 Cong. Rec. at 17,033. The Senator explained that this "protection for personal privacy" was already "part of the sixth exemption in the present law" and that "[b]y adding the protective language here, we simply make clear that the protections in the sixth exemption for personal privacy also apply to disclosure under the seventh exemption." *Ibid.*; see *id.* at 17,040 (reproducing memorandum that Senator Hart "distributed to each Senator").[6]

The ensuing debate demonstrates that the Senate was fully aware that Exemption 7's protection for "personal privacy"—copied directly from Exemption 6—

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[6] Unlike the balance of Senator Hart's amendment to Exemption 7, his proposal to protect "personal privacy" within the Exemption was not based on a legislative recommendation by the Administrative Law Section (ALS) of the American Bar Association. See 120 Cong. Rec. at 17,033; *cf. id.* at 17,035 (reprinting ALS proposal). During the Senate hearings on FOIA legislation, Robert Gilliat testified on behalf of the Department of Defense that the ALS's recommendation would "limit the use" of Exemption 7 by enumerating several specific "reasons for protecting investigatory records." 2 *Freedom of Information, Executive Privilege, Secrecy in Government: Hearings on S. 1142 Before Subcomms. of the Senate Judiciary and Government Operations Comms.* 86 (1973). Mr. Gilliat further explained that an investigatory record might not be deemed "'similar' to a personnel or medical file" otherwise protected by Exemption 6, and he therefore recommended amending Exemption 6 to "clarif[y]" that its protections would apply to investigatory records if Congress were to adopt the ALS's revision to Exemption 7. *Ibid.* Mr. Gilliat also concluded that the alternative of amending Exemption 7 itself to protect against "a clearly unwarranted invasion of personal privacy" was "a fairly good approach." *Ibid.* Senator Hart's subsequent proposal appears to have adopted that recommendation.

would protect only the privacy of individuals. During the debate, Senator Dole introduced into the record a court decision that expressly held that the identity of organizations, unlike the "identity of * * * individuals," cannot be withheld under Exemption 6 because "the right of privacy envisioned in [the Exemption] is *personal* and *cannot be claimed by a corporation* or association." 120 Cong. Rec. at 17,045 (emphasis added) (reprinting *Washington Research Project, Inc.* v. *HEW*, 366 F. Supp. 929, 937-938 (D.D.C. 1973), aff'd in part on other grounds, 504 F.2d 238 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975)). Nothing said in the congressional debate took issue with that principle.

Indeed, Senators debated whether Senator Hart's amendment would unduly risk the privacy of individuals. Senator Hruska, for instance, opposed Senator Hart's amendment on the ground that "information in law enforcement files must be kept in confidence to insure that the individual's right to privacy is secure," and he argued that the proposal could lead to the disclosure of information that would "infringe on the individual's right to privacy" by, *inter alia*, "caus[ing] embarrassment to individuals mentioned in FBI files." 120 Cong. Rec. at 17,036. Senator Hruska urged his colleagues not to alter the text of Exemption 7 because one of "the most important rights" that "an individual may possess, his right to privacy," was at stake. *Id.* at 17,037; see also *ibid.* (statement of Sen. Thurmond) (opposing amendment because it would lead to the "invasion of an individual's privacy"). After the Senate adopted Senator Hart's amendment and passed its text as part of H.R. 12,471, see *id.* at 17,041, 17,045-17,047, Senator Hruska declared that he would "urge the President as strongly as I can to veto this measure" because, *inter alia*, it "could set the stage for severe problems regarding the privacy of individuals." *Id.* at 17,046.

After the House of Representatives and the Senate appointed the members of the Conference Committee for H.R. 12,471, see 120 Cong. Rec. at 18,072, 18,506, President Ford wrote identical letters to the Conference Committee Chairmen, expressing specific concerns about the bill. Letter to the Chairmen of the Conference Committee Considering Freedom of Information Act Amendments, 2 Pub. Papers 45 (Aug. 23, 1974) (letters to Sen. Kennedy and Rep. Moorhead). As relevant here, the President wrote that he was "concerned that an individual's right to privacy would not be appropriately protected" by requiring disclosure of law-enforcement records "unless the invasion of individual privacy is *clearly unwarranted.*" *Id.* at 47. The President accordingly requested that the Conference Committee "strike the words 'clearly unwarranted' from" the proposed revision to Exemption 7 in order to prevent "the Freedom of Information Act from disclosing information harmful to the privacy of *individuals.*" *Ibid.* (emphasis added); see 120 Cong. Rec. at 33,158-33,159, 34,162-34,163 (reproducing President's letters).

The Conference Committee discussed the issues identified by the President and "adopted language * * * to respond to those concerns." 120 Cong. Rec. at 33,157 (statement of Sen. Kennedy). Among other things, the conferees specifically agreed to "strike the word 'clearly' from the Senate-passed language" to accommodate the President's concern regarding "law enforcement records involving personal privacy." *Id.* at 33,159, 34,163 (reproducing letter from committee chairmen to President Ford dated Sept. 23, 1974). Although both Houses of Congress adopted the Conference Report, *id.* at 33,300, 34,168-34,169, which memorialized that change, H.R. Conf. Rep. No. 1380, 93d Cong., 2d Sess. 12 (1974), President Ford vetoed H.R. 12,471. He explained, as relevant here, that requiring the government to "prove * * * that disclosure 'would' cause a type of harm specified in the amendment" could undermine the "confidentiality" of numerous law-enforcement files. Veto of Freedom of Information Act Amendments, 2 Pub. Papers 374, 375 (Oct. 17, 1974); see 120 Cong. Rec. at 36,243-36,244 (reproducing veto message).

Congress overrode the President's veto, see 120 Cong. Rec. at 36,633, 36,882, and its debate again confirmed that Exemption 7(C) was directed to the privacy of individuals. Although the House of Representatives focused on other matters, *id.* at 36,622-36,633, the Senate returned to its prior debate on "personal privacy." Senator Hruksa again argued against the bill, maintaining that it would be difficult for the government to prove that disclosure would constitute an unwarranted invasion of "personal privacy," and that such a requirement should not be imposed because "the individual's right to privacy" is at stake. *Id.* at 36,873. He contended that "[t]he right to know must be balanced against the right of the individual to privacy" and recommended sustaining the veto because the bill, in his view, incorrectly "emphasize[d]" the former "to the detriment of" the latter. *Ibid.* Although other Senators shared that view, see, *e.g.*, *ibid.* (statement of Sen. Taft) (bill would damage "the individual's right of privacy" in "law enforcement" records); *id.* at 36,877 (statement of Sen. Thurmond), the Conference Committee co-chair, Senator Kennedy, explained that "[w]e have been most careful to protect privacy" and indicated that the bill would "protect *individual* privacy" against unwarranted invasions. *Id.* at 36,865, 36,866 (emphasis added); see *id.* at 36,880 (statement of Sen. Ribicoff) (explaining that the FOIA amendments would "provide adequate guidelines to insure that an individual's right to privacy will not be endangered").

2. Congress's exclusive focus on the privacy of individuals when it enacted Exemption 7(C) also reflects the broader legislative context in which Congress debated and passed the 1974 FOIA amendments. At the same time that Congress was considering those amendments, it was also working to pass the Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (5 U.S.C. 552a).[7] The Privacy Act was "passed largely out of concern over the 'impact of computer data banks on individual privacy,'" and it therefore prohibits a federal agency (with specified exceptions) from disclosing any record in the agency's system of records except pursuant to the written authorization of the individual to whom the record pertains. *Reporters Committee*, 489 U.S. at 766 (citation omitted); see 5 U.S.C. 552a(b). This Court has accordingly con-

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[7] The substance of the Privacy Act as enacted in December 1974 was largely derived from H.R. 16,373, 94th Cong., 2d Sess. See *Perry* v. *FBI*, 759 F.2d 1271, 1275 n.4 (7th Cir. 1985); 120 Cong. Rec. at 39,204 (passing S. 3418 by inserting the text of H.R. 16,373 "as passed by the House"); *id.* at 40,880 (statement of Rep. Moorhead) (explaining House-Senate compromise that "retain[ed] the basic thrust of the House version" of the Privacy Act while including "important segments of the Senate measure"); cf. *id.* at 36,652-36,660, 36,955-36,966, 36,976 (H.R. 16,373 as passed by the House). That bill and its direct predecessors were developed from February 1974 until the House passed H.R. 16,373 on November 21, 1974. See *id.* at 36,976; H.R. Rep. No. 1416, 93d Cong., 2d Sess. 11 (1974) (explaining drafting history). That drafting history closely parallels the May to November 21, 1974 chronology for Exemption 7(C). See 120 Cong. Rec. at 17,033, 17,045-17,047, 33,300, 34,168-34,169, 36,633, 36,882 (Exemption 7(C) history).

cluded that "Congress' basic policy concern * * * for personal privacy" in the Privacy Act is "relevant in [the Court's] consideration of the privacy interest" protected by Exemption 7(C). *Reporters Committee*, 489 U.S. at 767.[8]

AT&T has itself acknowledged that the Privacy Act protects only the privacy rights of individuals. Br. in Opp. 23. Yet Congress referred to those individual rights in the Privacy Act in *precisely* the same way that it did in FOIA: It declared that the Privacy Act's purpose is to protect the "personal privacy" of "personal information" in agency records. See Privacy Act § 2(b), 88 Stat. 1896 (5 U.S.C. 552a note). That parallel statutory use of "personal privacy" in both FOIA and the Privacy Act reflects the established understanding that "personal privacy" refers only to the privacy interests of human beings.

In short, Members of Congress were aware that Exemption 7(C)'s "personal privacy" protection had been lifted directly from Exemption 6 to apply the same privacy protections to law-enforcement records, and that Exemption 6 had itself been construed to apply only to individuals, not corporations. The debates concerning Exemption 7(C) focused exclusively on the privacy rights of individuals, and Congress used the same statutory term "personal privacy" in the contemporaneously enacted Privacy Act to refer exclusively to the privacy of individuals. Nothing in Exemption 7(C)'s drafting history suggests that Congress intended the Exemption to protect artificial entities like corporations.[9]

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[8] Congress specifically addressed the statute's interaction with FOIA by providing that the Privacy Act's general prohibition on disclosure does not apply if disclosure would be "required under [FOIA]." 5 U.S.C. 552a(b)(2); see 120 Cong. Rec. at 40,882 (discussing provision).

C. Exemptions 6 And 7(C) Have Been Uniformly Understood For More Than 35 Years To Protect Only The Privacy Interests Of Individuals

For more than 35 years, since the 1974 enactment of Exemption 7(C), there has been unanimity among courts and commentators that the "personal privacy" protections in Exemptions 6 and 7(C) apply only to individuals. That uniform understanding accurately reflects the overwhelming textual and historical evidence demonstrating that Congress employed the term "personal privacy" in FOIA to refer to the privacy of individuals, not corporations.

Following the 1974 amendments to FOIA, Attorney General Edward Levi issued a memorandum that interpreted the new provisions. That memorandum concluded that Congress's use of "[t]he phrase 'personal privacy' [in Exemption 7(C)] pertains to the privacy interests of individuals" and thus "does not seem applicable to corporations or other entities." U.S. Dep't of Justice, *Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act* 9 (1975) (*1975 FOIA Memorandum*). That memorandum, which this Court has cited as a reliable interpretation of the 1974 amendments, see *Favish*, 541 U.S. at 169; *Abramson*, 456 U.S. at 622 n.5, further explained that Exemption 7(C) should be interpreted in light of "the body of court decisions" that interpret Exemption 6. See *1975 FOIA Memorandum* 9.[10]

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[9] Exemption 7(C) took its present form in 1986, when Congress modified the exemption to apply whenever disclosure "could reasonably be expected to" constitute an unwarranted invasion of "personal privacy." 5 U.S.C. 552(b)(7); see *Reporters Committee*, 489 U.S. at 756 & n.9, 778 n.22. That amendment vindicated President Ford's concerns with Exemption 7(C) by "eas[ing] considerably" the showing needed to protect personal privacy in law-enforcement records, *id.* at 756 n.9 (citation omitted); see 132 Cong. Rec. 29,619 (1986), but did not alter the meaning of "personal privacy."

The D.C. Circuit, which has jurisdiction over appeals from the district court that has universal jurisdiction over FOIA actions, see 5 U.S.C. 552(a)(4)(B), likewise has emphasized repeatedly that "businesses themselves do not have protected privacy interests under Exemption 6." *Multi Ag Media LLC* v. *USDA*, 515 F.3d 1224, 1228 (2008); see *Sims* v. *CIA*, 642 F.2d 562, 572 n.47 (D.C. Cir. 1980) ("Exemption 6 is applicable only to individuals."); *National Parks & Conservation Ass'n* v. *Kleppe*, 547 F.2d 673, 685 n.44 (D.C. Cir. 1976) ("The sixth exemption has not been extended to protect the privacy interests of businesses or corporations."). And in *Washington Post Co.* v. *United States Department of Justice*, 863 F.2d 96, 100 (D.C. Cir. 1988), the court of appeals concluded that Exemption 7(C) provides no privacy protection for "[i]nformation relating to business judgments and relationships." Those decisions reflect judicial recognition that both exemptions protect the same interest in "personal privacy," which does not encompass a purely corporate interest in confidentiality.[11]

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[10] Attorney General Levi's 1975 memorandum reflected an evolution in the Department of Justice's understanding of Exemption 6. In 1967, one year after Congress enacted FOIA, Attorney General Ramsey Clark described Exemption 6 as protecting "the privacy of any person" and stated that "the applicable definition of 'person,' which is found in section 2(b) of the Administrative Procedure Act, would include corporations and other organizations as well as individuals." U.S. Dep't of Justice, *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 36-37 (1967) (*1967 FOIA Memorandum*). Attorney General Clark then qualified his statement by observing that Exemption 6 normally would protect "the privacy of individuals rather than of business organizations." *Id.* at 37.

That initial description of Exemption 6 was promptly criticized as premised on an erroneous view that the statute protected "the privacy of any person," even though Congress employed the phrase "personal privacy" and did "not use th[e] term" "person." Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 799 (1967). Moreover, the Attorney General's description found no support in the legislative history cited in his analysis, which described Exemption 6 as protecting the "individual's right of privacy" and preventing "harm [to] the individual." *1967 FOIA Memorandum* 36 (quoting *1966 House Report* 11). No court subsequently endorsed this aspect of the Attorney General's analysis, and by 1974 courts and commentators had concluded that Exemption 6 is addressed to the protection of individuals. See pp. 22-24, *supra*. In 1975, Attorney General Levi agreed with the uniform body of law and commentary and concluded that "[t]he phrase 'personal privacy' * * * does not seem applicable to corporations." *1975 FOIA Memorandum* 9.

Indeed, the parallel text of Exemption 6 and Exemption 7(C) all but compels the conclusion that they protect the same respective privacy interests. This Court has concluded that "Exemption 7(C) is more protective of privacy than Exemption 6" based on the textual difference between disclosures (under Exemption 6) that

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[11] Agency records concerning corporations sometimes implicate the privacy of an individual and therefore may be withheld to protect that individual's "personal privacy." For instance, Exemptions 6 and 7(C) can "appl[y] to financial information in business records when the business is individually owned or closely held and 'the records would necessarily reveal at least a portion of the owner's personal finances.'" *Multi Ag Media LLC*, 515 F.3d at 1228-1229 (Exemption 6) (citation omitted); see *Consumer's Checkbook* v. *HHS*, 554 F.3d 1046, 1051 (D.C. Cir. 2009) (Exemption 6), cert. denied, 130 S. Ct. 2140 (2010). Similarly, a corporation's identity may be withheld when it sufficiently risks the "identification of [a] corporate officer who reported [a] crime" to the government. *Computer Prof'ls for Social Responsibility* v. *United States Secret Serv.*, 72 F.3d 897, 905 (D.C. Cir. 1996) (Exemption 7(C)).

"would" constitute a "clearly unwarranted" invasion of personal privacy and disclosures (under Exemption 7(C)) that merely "could reasonably be expected" to constitute an "unwarranted" invasion. *DoD*, 510 U.S. at 497 n.6. In other words, the exemptions simply "differ in the magnitude of the public interest that is required to override the respective privacy interests" they protect. *Ibid.* "The privacy interest protected" by the exemptions, however, is the same. Cf. *id.* at 500 (following *Reporters Committee*'s understanding of "personal privacy" in the Exemption 7(C) context to define "[t]he privacy interest protected by Exemption 6"). The lower courts have accordingly concluded that "the only distinction between the balancing tests applied [by Exemptions 6 and 7(C)] is the 'magnitude of the public interest' required to override the respective privacy interests they protect." See *Forest Serv. Employees for Envtl. Ethics* v. *United States Forest Serv.*, 524 F.3d 1021, 1024 n.2 (9th Cir. 2008); see also, *e.g.*, *Horowitz* v. *Peace Corps*, 428 F.3d 271, 279 & n.2 (D.C. Cir. 2005) (analyzing Exemption 6 "privacy interest" based on Exemption 7(C) decisional law; explaining that "the difference between the standards for the two exemptions 'is of little import' except when analyzing 'the magnitude of the public interest that is required to override the respective privacy interests protected by the exemptions'") (quoting *DoD*, 510 U.S. at 497 n.6), cert. denied, 547 U.S. 1041 (2006); *FLRA* v. *United States Dep't of Veterans Affairs*, 958 F.2d 503, 510 (2d Cir. 1992) (explaining that the balance between personal privacy and any public interest in disclosure is different under Exemptions 6 and 7(C), but that the "degree of invasion to th[e] privacy interest" necessary to trigger that balance is the same).

Scholars likewise have concluded that FOIA's protection for "personal privacy" protects only individuals. A leading treatise on administrative law, for instance, explains that Exemption 6 "does not extend to information concerning corporations" because it "provides a qualified exemption only for 'personal privacy.'" 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 5.12, at 373 (5th ed. 2010); accord, *e.g.*, 4 Charles H. Koch, Jr., *Administrative Law and Practice* § 14:36[2], at 502 (3d ed. 2010) (*Koch Treatise*) (Exemption 6 "covers only 'personal privacy' and hence it was only intended to protect confidential information about private individuals," not "business entities or other associations," which "must look to exemption 4" for protection); 2 Jacob A. Stein et al., *Administrative Law* § 10.07[1], at 10-204 (Dec. 2006) (*Stein Treatise*) ("[T]he phrase 'personal privacy' * * * refers to the privacy interests of individuals * * * but excludes businesses."). The same textual analysis holds true for Exemption 7(C). See 1 Justin D. Franklin & Robert F. Bouchard, *Guidebook to the Freedom of Information and Privacy Acts* § 1:104, at 1-719 to 1-720 & n.54 (2d ed. Apr. 2010) (explaining that "the privacy interest protected under Exemption 7(C) is only applicable to 'individual' privacy interests, as also described in Exemption 6," such that "corporations * * * do not generally possess a protectible privacy interest under Exemption 7(C)" except where disclosure would, for instance, affect the privacy of individual "owners' personal finances"); *id.* § 1.77, at 1-552 to 1-553 & n.70 (same for Exemption 6); 2 James T. O'Reilly, *Federal Information Disclosure* § 17:75, at 172 & n.5 (3d ed. 2000) (Exemption 7(C)'s protections "are limited to individual matters and actions" such that "[c]orporations do not usually qualify for [Exemption] 7(C) privacy interests" unless the relevant records affect "individuals' interests in privacy"); *id.* § 16:7, at 13-14 (same for Exemption 6). In other words, "the intent of [Exemptions 6 and 7(C)] is the same": the "protection of the individual's right of privacy." *Stein Treatise* § 10.08[4][c], at 10-273.[12]

Then-Professor Scalia similarly testified in 1981 that "[p]erhaps the most significant feature" of the 1974 FOIA amendments to Exemption 7 was that they did not protect "what might be called associational or institutional privacy" from requests under FOIA for disclosure of investigatory records about "corporations, unions," and other "independent institutions." 1 *Freedom of Information Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 957-958 (1981). The Exemption 7 amendments, Professor Scalia explained, gave no "protection [to] those institutions' deliberate and consultative processes" and therefore enabled FOIA requesters to "impair[ ]" the "privacy * * * of [such] institutions." *Id.* at 958.

In the face of these uniform decisions and commentaries, AT&T has argued that one decision—*Judicial Watch, Inc.* v. *FDA*, 449 F.3d 141 (D.C. Cir. 2006)—suggests that corporations might possess "personal privacy" under Exemption 6. See Br. in Opp. 14-15, 29-30. But even the court below rejected that reading of *Judicial Watch*. Pet. App. 14a n.6. In *Judicial Watch*, the

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[12] See also, *e.g.*, *Koch Treatise* § 14.37[4](c)(i), at 517 ("Both exemption 6 and exemption 7(C) require a balance of the public interest in disclosure against the individual's interest in privacy."); Lee Modjeska, *Administrative Law: Practice and Procedure* §§ 3.14-3.15, at 65, 69 (1982) (Exemptions 6 and 7(C) both require "balanc[ing] the individual's privacy interest against the public's disclosure interest").

FDA withheld the names of "private individuals and companies" and the street addresses of businesses that had worked on approval of the controversial morning-after abortion drug, RU-486. 449 F.3d at 152. The government argued that employees of those companies had a privacy interest in withholding "the names and addresses of * * * businesses associated with [the drug]" in order to avoid potential "abortion-related violence." *Id.* at 153; see Gov't Br. at 39-43, *Judicial Watch*, *supra* (No. 05-5256), available at 2006 WL 515736 (arguing that "all of the withheld information," including business "street address[es]," can "be identified as applying to a particular individual" and implicate the "personal privacy interests of these employees"). The D.C. Circuit agreed that "individuals have a 'privacy interest in the nondisclosure'" to "avoid[] physical danger," and concluded that the government need not justify withholding on an "individual-by-individual basis" because the same "privacy interest extends to all such employees." 449 F.3d at 153 (citations omitted). The court thus held that Exemption 6 exempted the information from disclosure by balancing the private interest involved—"namely, 'the individual's right of privacy'"—and concluding that the "private interest in avoiding harassment or violence tilts the scales" to nondisclosure. *Ibid.* (citation omitted). In other words, *Judicial Watch* was about an individual's "personal privacy," not a corporation's. Cf. p. 36 n.11, *supra*.

The court of appeals' decision in this case is a singular outlier in the face of more than 35 years of the uniform understanding that FOIA's protection for "personal privacy" extends only to safeguard the privacy of individuals. And although "novelty is [not] always fatal in the construction of an old statute," *Keene Corp.* v.

United States, 508 U.S. 200, 213 (1993), "[t]he presumption is powerful" that the reason that the court of appeals' newly minted interpretation of Exemption 7(C) was not "uncovered by judges, lawyers or scholars" for more than 35 years is "because it is not there." *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 370-371 (1959). AT&T has yet to offer even a scintilla of evidence that Congress, the Executive, the Judiciary, or any private entity ever previously thought that corporations would have "personal privacy" under Exemption 7(C). That failure reflects the remarkably consistent view that the Exemption protects only the privacy of individuals, not corporate entities.

D. The Court Of Appeals' Analysis Does Not Withstand Scrutiny

The court of appeals did not dispute that the "ordinary" meaning of "personal privacy" excludes corporate secrecy. Pet. App. 12a. It concluded instead that Exemption 7(C) diverges from that normal understanding because the APA defines the term "person" to include corporations and that "defined term" is "the root from which the statutory word at issue [(personal)] is derived." *Ibid.* That analysis, which led the court to conclude that "FOIA's text unambiguously" shows that corporations possess "personal privacy," *id.* at 13a, does not withstand scrutiny.

1. As Professor Davis explained, the APA's "definition of 'person'" is "irrelevant" because Congress "d[id] not use that term" in Exemption 7(C). Kenneth Culp Davis, *Administrative Law Treatise* § 3A.22, at 163-164 (1970 Supp.) (discussing Exemption 6). Exemption 7(C) instead uses the undefined phrase "personal privacy." Had Congress intended in Exemption 7(C) to invoke the

APA's definition of "person" and protect "the privacy of any person," it would have used words to that effect. See *ibid.*

Indeed, Congress did precisely that in other provisions of FOIA. For example, Congress expressly recognized that corporations and other entities may provide to the government trade secrets and confidential commercial or financial information warranting protection, and it therefore drafted Exemption 4 to apply to such information that the government has "obtained from a person." 5 U.S.C. 552(b)(4). Corporate entities can also be parties to judicial or administrative proceedings that should not be prejudiced by publicly disclosing law-enforcement records. Congress accordingly included within a different provision of Exemption 7 protections against such disclosures that "would deprive a person of a right to a fair trial or an impartial adjudication." 5 U.S.C. 552(b)(7)(B). Congress chose not to follow a similar course in Exemption 7(C), and its decision should be given full effect.

The linguistic relationship between the words "person" and "personal"—*i.e.*, that the former is a "root" of the latter, Pet. App. 12a—likewise cannot support the court of appeals' holding.[13] When Congress specifically intends to extend a statutory definition to related "variants" of a defined term, it generally enacts definitional language reflecting that intent. See, *e.g.*, 15 U.S.C. 3802(f) (extending definition to "any variant" of defined terms); 17 U.S.C. 101, 111(f); 33 U.S.C. 1122(6); 42 U.S.C. 7703(1) and (3); 45 U.S.C. 702(10), 802(5). FOIA includes no such instruction. The same is true for the Dictionary Act, 1 U.S.C. 1 *et seq.*, which establishes interpretive rules that apply generally to all federal legislation. Cf., *e.g.*, 1 U.S.C. 1 (establishing, *inter alia*, the general rule that statutory use of the singular includes the plural and vice versa, that the present tense includes the future; and that the masculine includes the feminine).

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[13] The word "personnel" in "personnel * * * files," 5 U.S.C. 552(b)(6), for instance, shares the same "root" as "personal," yet Congress clearly used the term "personnel" in Exemption 6 to refer to files for federal officials, not corporate entities.

In the absence of such a provision, the meaning of a linguistic "variant," as of any other term, "is a creature not of definitional possibilities but of statutory context." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). Indeed, "it is a 'fundamental principle of statutory construction * * * that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.'" *Textron Lycoming Reciprocating Engine Div.* v. *United Auto. Workers*, 523 U.S. 653, 657 (1998) (*Textron*) (citations omitted). Even when Congress provides an *express* definition for a statutory phrase, this Court has looked to both "the statutory text and context" to construe the meaning of the phrase. See *Burgess* v. *United States*, 553 U.S. 124, 129-133 (2008) (looking to statute's context to decide whether the defined term "felony drug offense" incorporates the statute's separate definition of the term "felony"). Where as here, Congress has not defined the term "personal" or the phrase "personal privacy," those terms must also be understood in their proper context.

Viewed in light of that principle, the error of the Third Circuit's decision becomes clear. The phrase "personal privacy" must be understood as a textual unit. See *Textron*, 523 U.S. at 656-657 (explaining that the term "for" cannot be properly understood in isolation from "the meaning of '[s]uits for violation of contracts'") (brackets in original). And the phrase must additionally "be read in [its] context and with a view to [its] place in the overall statutory scheme.'" *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citation omitted). Given its context and purpose in the overall framework of FOIA, the term "personal privacy" plainly refers only to the interest of individuals, and not of corporations. See pp. 17-34, *supra*.

2. The court of appeals' attempt to reconcile its interpretation of Exemption 7(C) with Exemption 6 is equally unpersuasive. The court of appeals assumed *arguendo* that FOIA's protection for "personal privacy" in Exemption 6 "applies only to individuals (and not to corporations)," but it reasoned that that assumption did not undermine its conclusion that the term "personal privacy" in Exemption 7(C) goes further to protect corporate interests in secrecy. Pet. App. 13a. The court indicated that its understanding of the phrase "personal privacy" would apply uniformly to both provisions but that the separate "phrase 'personnel and medical files'" in Exemption 6 would limit that exemption's scope "to individuals because only individuals (and not corporations) may be the subjects of such files." *Ibid.* That reasoning is incorrect.

First, Congress's decision to apply Exemption 6 to "personnel and medical files and similar files" confirms the common-sense understanding that only individuals possess "personal privacy" and that the purpose of Exemption 6 (and therefore Exemption 7(C)) is to protect individuals. In the Court's leading decision addressing the types of files referred to in Exemption 6, the Court found it "abundantly clear" that Exemption 6's personal-privacy protections reflect Congress's general concern for "the kind of confidential personal data usually included in a personnel file." *Washington Post Co.*, 456 U.S. at 601 (quoting *Rose*, 425 U.S. at 372). But the Court concluded that the illustrative types of files that Congress listed in the Exemption do not limit its protections to "a discrete kind of personal information" concerning individuals or to only "intimate details" or "highly personal" information. *Id.* at 600, 602 (citations omitted). Rather, they reflect that Congress was concerned with the "disclosure of information that applies to a particular individual." *Id.* at 602. As a result, information that could cause "embarrassment" nonetheless falls outside the scope of Exemption 6 where it is "not personal to any *particular* individual." *Id.* at 602 n.4 (emphasis added).

Moreover, the court of appeals' view that "only individuals (and not corporations) may be the *subjects* of [the types of] files" specifically mentioned by Exemption 6, Pet. App. 13a (emphasis added), does not properly distinguish the court's reading of Exemption 7(C) from Exemption 6. Exemption 6 applies to an individual who is *not* the subject of the records at issue, because it applies to any records that contain information that can be "identified as applying to that individual." See *Washington Post Co.*, 456 U.S. at 601-602 (citation omitted); *Wood* v. *FBI*, 432 F.3d 78, 86-87 (2d Cir. 2005) (citing cases); *New York Times Co.* v. *NASA*, 920 F.2d 1002, 1007-1009 (D.C. Cir. 1990); cf. *Favish*, 541 U.S. at 166 (explaining that Exemption 7(C) protects individuals whose personal information is in law-enforcement files by "mere happenstance"). The phrase "personnel and medical files and similar files" therefore would not justify limiting Exemption 6 to the privacy of individuals if "personal privacy" encompassed corporate privacy interests. Indeed, the disclosure of personnel, medical, and similar files could reveal information about corporations and their internal affairs just as they reveal information about individuals. Such files, for example, could disclose whether a company discriminated against its employees by including documentation of employee's internal complaints of such discrimination and related matter. Medical files likewise could indicate whether a corporation has engaged in a pattern of providing substandard medical care to individual subjects of the files. The central point, however, is that Exemptions 6 and 7(C) both protect only individuals because both employ the same term—"personal privacy"—to impose that limitation. Cf. *Reporters Committee*, 489 U.S. at 768-770 (applying Exemption 6 precedents to analyze an "invasion of privacy" under Exemption 7(C)).

3. In its brief in opposition to the certiorari petition, AT&T attempted to defend the court of appeals' reasoning on grounds not advanced by the court of appeals itself. None of those grounds is persuasive.

a. For instance, AT&T argued that "personal privacy" should be understood to apply to corporations because a court may have "'personal' jurisdiction" over corporate litigants. Br. in Opp. 27. But "personal jurisdiction" defines when a *court* may exercise jurisdiction over a defendant. It thus naturally applies to corporations, which are legal entities that may own property and may be sued. But that authority of a court is not at all "personal" *to a corporation* in the same sense that an individual may possess "personal privacy."

b. AT&T also argued that corporations have "privacy" and other rights in some constitutional contexts. Br. in Opp. 27-29. Those contentions are misplaced for two reasons. First, although common-law and constitutional privacy concepts may be significant benchmarks in interpreting the scope of FOIA's "personal privacy" protections, "[t]he question of the statutory meaning of privacy" under FOIA is not the same as "whether an individual's interest in privacy is protected by the Constitution." *Reporters Committee*, 489 U.S. at 762 n.13. The same holds true with respect to corporations.

More fundamentally, the rights that AT&T identifies are not rights that suggest that a corporation has "personal privacy" interests recognized by law.

For instance, the fact that corporations may enjoy Fourth Amendment protections (Br. in Opp. 28 & n.14) in some contexts does not show that they have "personal privacy." This Court has concluded that "[t]he businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property," *See* v. *City of Seattle*, 387 U.S. 541, 543 (1967), and the Court has applied that Fourth Amendment right when such people conduct business under the corporate form. See *Dow Chem. Co.* v. *United States*, 476 U.S. 227, 236 (1986) (applying *See*). That protection for "business premises," *G.M. Leasing Co.* v. *United States*, 429 U.S. 338, 353 (1977), is derivative of the individual rights of those who collectively own and operate corporations. The Court has accordingly explained that "[c]orporations are a necessary feature of modern business activity," and when "an association of individuals" form a corporation that operates as a "distinct legal entity," that process of "organizing * * * as a collective body * * * waives no constitutional immunities appropriate to such body" under the Fourth Amendment. *Hale* v. *Henkel*, 201 U.S. 43, 76 (1906), overruled in part on other grounds, *Murphy* v. *Waterfront Comm'n*, 378

U.S. 52, 65-73 (1964).[14] Moreover, because "the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home," the Fourth Amendment permits Congress to authorize warrantless regulatory searches of businesses in appropriate contexts. *Donovan* v. *Dewey*, 452 U.S. 594, 598-599 (1981) (Fourth Amendment permits Congress to authorize warrantless searches of mining companies).[15] The expectation of privacy that attaches to business premises is thus derivative of and secondary to the individual rights and property that the Amendment protects. Cf. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950) ("[C]orporations can claim no equality with individuals in the enjoyment of a right to privacy" under the Fourth Amendment.). Nothing in the Fourth Amendment's protections against unreasonable searches and seizures suggests that corporations have "personal privacy" rights, much less that they have such rights under FOIA.

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[14] See *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 311 (1978) (Fourth Amendment protects corporation's "business premises" against unreasonable search because the Framers sought to protect the "merchants and businessmen whose premises and products were inspected"); *Oklahoma Press Publ'g Co.* v. *Walling*, 327 U.S. 186, 208-209, 213 (1946) (Fourth Amendment imposes limits on subpoenas for corporate documents to protect "the interests of men to be free from officious intermeddling").

[15] See *United States* v. *Biswell*, 406 U.S. 311, 316 (1972) (same for firearms dealers); *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, 76-77 (1970) (same for liquor dealers); see also *New York* v. *Burger*, 482 U.S. 691, 702 (1987) (regulatory search doctrine grounded in fact that "the owner or operator of commercial premises in a 'closely regulated' industry has a reduced expectation of privacy"); *Barlow's, Inc.*, 436 U.S. at 313 (explaining that business premises in certain regulated industries have "no reasonable expectation of privacy" because the "businessmen engaged in such * * * regulated enterprises accept the burdens as well as the benefits of their trade").

AT&T's reliance on the Double Jeopardy Clause (Br. in Opp. 28) is similarly unavailing. This Court has not even squarely addressed whether corporations enjoy double jeopardy protection. In *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 570-576 (1977), the Court assumed that corporations have such protection without deciding the question. *See id.* at 570-576; *cf.* U.S. Br. at 13 n.6, *Martin Linen*, *supra* (No. 76-120) (indicating that government "kn[e]w of no reason why the Double Jeopardy Clause" should apply to a corporate defendant, but stating that the government had "not presented it as a question for resolution by this Court" because the government failed to argue the point below). And although the Court noted that the Clause generally protects against "embarrassment" and a "continuing state of anxiety and insecurity" as part of the "personal strain which a criminal trial represents for the *individual* defendant," 430 U.S. at 569 (emphasis added; citations omitted), that specific rationale would not apply to a corporate defendant, which would not experience such emotions. If the Double Jeopardy Clause protects corporations from successive prosecutions, it would not be to protect them from "embarrassment," but rather to advance the "primary purpose" of the Clause, namely, to "protect the integrity" of final determinations of guilt or innocence, *United States* v. *Scott*, 437 U.S. 82, 92 (1978), by preventing the government from "taking the question of guilt to a series of persons or groups empowered to make binding determinations," *Swisher* v. *Brady*, 438 U.S. 204, 216 (1978).

This Court has concluded that the "records and documents" of corporations—like the records that AT&T

provided to the FCC in this case—themselves "embody no element of *personal privacy*" and, for that reason, cannot be protected from compelled disclosure under the Fifth Amendment's "privilege against self-incrimination." *United States* v. *White*, 322 U.S. 694, 699-700 (1944) (emphasis added). That privilege is "a purely personal" right wholly inapplicable to corporations. *Id.* at 699; see *Braswell* v. *United States*, 487 U.S. 99, 102, 104-105 (1988) (Corporations are "'creature[s] of the State,' with powers limited by the State," and that, while individuals may assert their own right against self-incrimination concerning corporate matters, "corporate books and records are not 'private papers' protected by th[at] Fifth Amendment" right.) (citation omitted). The interest in "personal privacy" under Exemption 7(C) likewise protects only individuals, not corporations.

E. Adopting The Court Of Appeals' Rationale Would Produce Anomalous And Unprecedented Results

The logical implications of the Third Circuit's analysis further underscore the flaws in its decision. If the court of appeals were correct that it is a "grammatical imperative" that the undefined phrase "personal privacy" in FOIA must incorporate the APA's statutory definition of the term "person," Pet. App. 12a (citation omitted), then many other entities, beyond corporations, would also possess "personal privacy" under FOIA. That reading would yield highly anomalous results that Congress would have expressly addressed had it intended them.

The APA defines "person" to include not only an individual and a corporation but also a "public * * * organization other than [a federal government] agency." 5 U.S.C. 551(2); see 5 U.S.C. 551(1) (defining "agency").

Foreign, state, and local governments and governmental entities therefore are deemed "persons" under both the APA and FOIA. See *Maryland Dep't of Human Res.* v. *HHS*, 763 F.2d 1441, 1445 n.1 (D.C. Cir. 1985) (state agency); *Stone* v. *Export-Import Bank*, 552 F.2d 132, 136-137 (5th Cir. 1977) (foreign governmental agency is a "person" under FOIA), cert. denied, 434 U.S. 1012 (1978).[16] Congress accordingly has recognized that foreign governments are "persons" that may submit FOIA requests for agency records under 5 U.S.C. 552(a)(3)(A), and it specifically amended FOIA to ensure that the U.S. Intelligence Community would not produce agency records in response to FOIA requests from such persons. See 5 U.S.C. 552(a)(3)(E); H.R. Rep. No. 592, 107th Cong., 2d Sess. 11, 27 (2002) (provision prohibits Intelligence Community agencies from responding to "foreign government FOIA requests"). The Third Circuit's rationale would entitle all such entities to "personal privacy" under Exemption 7(C).

It would be exceedingly difficult to identify the parameters of a corporation's or a domestic or foreign government's so-called "personal privacy" interest under FOIA. And it would be even more difficult to determine whether disclosure would "constitute an unwarranted invasion" of such privacy, 5 U.S.C. 552(b)(7)(C), by balancing that wholly novel and non-intuitive privacy interest against the public interest in disclosure. Collective entities such as corporations and governments exist to serve the interests of their shareholders and constituents in the public, yet Exemption 7(C) would demand a balancing of such newly created organizational privacy interests against the interest of the public (including some of the same shareholders and constituents) in disclosure. Cf. *Favish*, 541 U.S. at 171.

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[16] Cf., *e.g.*, *Bowen* v. *Massachusetts*, 487 U.S. 879, 892-893 (1988) (concluding that a State was a "person suffering legal wrong because of agency action," 5 U.S.C. 702); 5 U.S.C. 701(b)(2) (adopting definition of "person" in 5 U.S.C. 551(2)).

The untethered analysis required by the court of appeals' decision contrasts sharply with the balancing required when federal agencies and the courts consider the privacy of individuals under Exemptions 6 and 7(C). Background principles concerning individuals' interest in "personal privacy" provide an important and objective reference for that balancing. The Court in *Reporters Committee*, for instance, reasoned from "the common law and the literal understandings of privacy" to conclude that the "personal privacy" protected by Exemption 7(C) includes the "individual's control of information concerning his or her person." 489 U.S. at 762-763; see also *DoD*, 510 U.S. at 500 (following *Reporters Committee*'s understanding of "personal privacy" to define "[t]he privacy interest protected by Exemption 6"). And when this Court in *Favish* held that Exemption 7(C)'s "right to personal privacy" extends beyond "the right to control information about oneself" to protect the privacy of at least some "individuals" when their own "personal data are not contained in the requested materials," 541 U.S. at 165 (citation omitted), the Court was careful to emphasize that "Congress' use of the term 'personal privacy'" in FOIA includes "rights against public intrusions long deemed impermissible *under the common law and in our cultural traditions.*" *Id.* at 167 (emphasis added).

In so ruling, *Favish* recognized that "there must be some stability with respect to both the specific category of personal privacy interests protected by [FOIA] and the specific category of public interests that could outweigh the privacy claim. 541 U.S. at 173. Without an established referent against which abstract assertions of "privacy" may be measured objectively, federal agencies and the courts would improperly be "left to balance in an ad hoc manner with little or no real guidance." *Ibid.*

Yet the Third Circuit's reasoning does precisely that: It creates a novel and unprecedented interest in so-called "personal privacy" for corporate entities—and, by necessary implication, governmental entities—for which there are no common-law or historical predicates. Establishing the metes and bounds of this newly created privacy interest would place federal agencies and the courts in entirely uncharted territory. Had Congress intended to authorize such an unbounded endeavor, it surely would have given at least some indication that it intended that extraordinary exercise of policy-making authority and supplied some framework for doing so. But, as explained above, the text, context, and legislative history of Exemption 7(C) point in precisely the opposite direction. They reflect that Congress intended "personal privacy" to safeguard only the previously recognized privacy of individual human beings. See pp. 17-34, *supra*.

The court of appeals asserted that, like an individual, a corporation can suffer "public embarrassment, harassment, and stigma." Pet. App. 14a n.5. But beyond that attempted personification of an entity the very existence of which is a legal construct, the court of appeals provided no insight into how a corporation's experience of "personal privacy" would be analogous to that of an individual. A corporation itself can no more be embarrassed, harassed, or stigmatized than a stone. And while a corporation may have commercial or property interests that can be adversely affected by disclosures of certain information, those interests (which have not heretofore been regarded as interests in "personal privacy") are addressed elsewhere in the law, including elsewhere in FOIA. See pp. 19-20, 24-26, *supra* (discussing protections for corporations under the common law and Exemption 4).

Under the court of appeals' reasoning, information obtained by law-enforcement agencies that is not protected by Exemption 4 or the other portions of Exemption 7 could nevertheless be withheld based on an assertion that public disclosure could result in "embarrassment" or "stigma" to those companies. Nothing suggests that Congress intended to give such unprecedented and expansive protections under the rubric of "personal privacy."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 2010

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
NOV 10 2010
OFFICE OF THE CLERK

No. 09-1279

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Petitioners,

v.

AT&T INC. AND COMPTEL,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT COMPTEL IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(C), exempts from mandatory disclosure records or information compiled for law enforcement purposes but only to the extent that such disclosure could reasonably be expected to constitute an unwarranted invasion of "personal privacy." The question presented is:

Whether Exemption 7(C)'s protection for "personal privacy" protects the "privacy" of corporate entities.

PARTIES TO THE PROCEEDINGS

The Federal Communications Commission and United States of America were Respondents in the court below and are Petitioners in this Court. AT&T Inc. was Petitioner in the court below and is a Respondent in this Court. COMPTEL was an Intervenor in the court below and is a Respondent supporting the Petitioners in this Court. COMPTEL is a non-profit corporation and has not issued shares or debt securities to the public. It does not have any parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit is reported at 582 F.3d 490 and is reproduced in Appendix A to the petition for a writ of certiorari starting at 1a. The Federal Communication Commission's order is reported at 23 F.C.C.R. 13,704 and is reproduced in Appendix B to the petition for a writ of certiorari starting at 19a.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on September 22, 2009. The Third Circuit denied a petition for rehearing on November 23, 2009. Pet. App. D at 45a-46a. On February 12, 2010, Justice Alito extended the time within which to file a petition for a writ of certiorari until March 23, 2010. On March 15, 2010, Justice Alito further extended the time within which to file a petition for a writ of certiorari until April 22, 2010. The petition for a writ of certiorari was filed on April 22, 2010, and was granted on September 28, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act (FOIA), 5 U.S.C. § 552 provides in pertinent part:

> (b) This section does not apply to matters that are . . .
>
> > (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
> >
> > (7) records or information compiled for law enforcement purposes, but only to the extent that

> the production of such law enforcement records or information . . .
>
> > (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy[.]

STATEMENT OF THE CASE

This case presents the question whether corporations have protected "personal privacy" interests within the meaning of FOIA Exemption 7(C).

A. The Freedom of Information Act and Its Personal Privacy Exemptions

Congress enacted FOIA in 1966 "to permit access to official information long shielded unnecessarily from public view." *EPA v. Mink*, 410 U.S. 73, 80 (1973). FOIA's "basic purpose reflected 'a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.'" *Dep't of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976) (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965)). "Congress carefully structured nine exemptions from the otherwise mandatory disclosure requirements in order to protect specified confidentiality and privacy interests." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 220-21 (1978). "[T]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act," and they must be "narrowly construed." *Rose*, 425 U.S. at 361.

At the time of FOIA's enactment, the only exemption to mention "personal privacy" was Exemption 6, which exempts from mandatory disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). As the House Report on FOIA explains, Exemption 6's purpose is to provide "a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966).

As originally enacted, Exemption 7 applied to all "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966). In 1974, in response to certain D.C. Circuit decisions that it believed had construed the exemption too broadly, and out of concern that agencies could commingle nonexempt materials with exempt materials in law enforcement files to avoid disclosure, Congress amended Exemption 7 to remove from its scope investigatory records the release of which would not cause any harm. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. at 227-30. As amended, Exemption 7 permitted agencies to withhold investigatory records only where disclosure would cause one of six enumerated harms. *See John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 156 (1989) ("As amended, Exemption 7 requires the Government to demonstrate that a record is 'compiled for law enforcement purposes' *and* that disclosure would effectuate one or more of the six specified harms." (emphasis in original)). The provision at issue here, Exemption 7(C), covered investigatory records the release of which would "constitute an unwarranted invasion of personal privacy." Freedom of Information Act Amendments of 1974, Pub. L. No. 93-502, § 2(B), 33 Stat. 1561 (1974). In 1986, Exemption 7(C) was amended again and, in its current form, applies to law enforcement records the release of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

B. COMPTEL's FOIA Request and Proceedings Below

Effective December 16, 2004, Respondent AT&T[1] and the FCC's Enforcement Bureau entered into a Consent Decree that terminated an investigation into possible violations of Section 254 of the Communications Act, 47 U.S.C. § 254, and FCC rules by AT&T in relation to its receipt and use of E-Rate universal service funds.[2] The E-Rate program assists schools and libraries in obtaining affordable access to telecommunications and Internet access services by funding discounts for those services. *See* 47 U.S.C. § 254(h). Service providers such as AT&T are reimbursed for the discounts on the services they provide to eligible schools and libraries with federal universal service funds administered by the Universal Service Administrative Company ("USAC") under the supervision and direction of the FCC. According to the Consent Decree, AT&T informed the FCC that it had invoiced USAC for services not eligible for E-Rate support, for services for which it had not sought or received authorization, and for services in one funding year that were provided in another. Consent Decree ¶ 3. To resolve the matter, AT&T reimbursed USAC and agreed to make a "voluntary contribution" of $500,000 to the U.S. Treasury. *Id.* ¶ 5.

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[1] The FCC's Memorandum Opinion and Order and the pleadings filed at the FCC refer to Respondent AT&T as SBC Communications, Inc. SBC acquired AT&T in November 2005 and changed its name to AT&T. For convenience, AT&T is used throughout to refer to Respondent AT&T.

[2] In the Matter of SBC Communications, Inc., File No. EB-04-IH-0342, 19 F.C.C.R. 24014 (Enf. Bur. 2004) ("Consent Decree").

COMPTEL is a national trade association that represents communications service providers and their supplier partners. On April 4, 2005, COMPTEL filed a FOIA request with the FCC seeking a copy of the Enforcement Bureau's file on the investigation into AT&T. AT&T objected to the release of any documents to COMPTEL arguing, *inter alia*, that the entire file was exempt from disclosure pursuant to FOIA Exemption 7(C). COMPTEL responded that corporations do not have "personal privacy" interests protected by Exemption 7(C), but noted that it did not object to the redaction of personally identifiable information relating to any AT&T employees that might be in the file. *See* Pet. App. C at 36a-37a.

The Enforcement Bureau agreed with COMPTEL and rejected AT&T's argument that Exemption 7(C) protected all of the records from disclosure, explaining that "businesses do not possess 'personal privacy' interests as required for application of FOIA Exemption 7(C)." *Id.* at 42a-43a. The Enforcement Bureau stated that it would make certain documents available, with AT&T employees' personal information redacted, unless AT&T filed a timely application for review. *Id.* at 43a. AT&T filed an application for review on August 19, 2005, arguing that FOIA Exemption 7(C) protected all documents in the

Enforcement Bureau file from disclosure. Pet App. B at 22a, 26a.

On September 12, 2008, the FCC denied AT&T's application for review. The FCC explained that AT&T's "position that a corporation has 'personal privacy' interests within the meaning of Exemption 7(C) is at odds with established Commission and judicial precedent," *id.* at 26a, and rejected AT&T's contention that "protecting a corporation from 'embarrassment' falls within the purposes of Exemption 7(C)." *Id.*

AT&T filed a Petition for Review of the FCC's decision in the United States Court of Appeals for the Third Circuit, and COMPTEL intervened. The Third Circuit granted AT&T's petition. Pet. App. A at 2a. Although the Third Circuit acknowledged that this Court's decisions may "suggest that Exemptions 7(C) and 6 frequently and primarily protect—and that Congress may have intended them to protect—the privacy of individuals," it held that "FOIA's text unambiguously indicates that a corporation may have a 'personal privacy' interest within the meaning of Exemption 7(C)." *Id.* at 11a. According to the Third Circuit, because "person" is defined in the Administrative Procedure Act (APA), which includes FOIA, to include corporations, "personal privacy" must also include corporate privacy. The court stated that "[i]t would be very odd indeed for an adjectival form of a defined term *not* to refer back to that defined term." *Id.* (emphasis in original). In addition, the Third Circuit noted that Congress used the term "individual" elsewhere in FOIA and could have used it in Exemption 7(C) if it intended to limit its application solely to the privacy of human beings. *Id.* at 12a. In reaching its decision, the Third Circuit declined to consider the "statutory purpose, relevant (but non-binding) case law, and legislative history" of FOIA. *Id.* at 14a. Stating that disclosure of information covered by Exemption 7(C) would violate 47 C.F.R. §0.457(g)(3), the court remanded the case to the FCC to determine whether disclosure of any of the documents could reasonably be expected to constitute an unwarranted invasion of AT&T's "personal privacy." Pet App. A at 7a n.2, 17a.

SUMMARY OF ARGUMENT

I. FOIA Exemption 7(C) protects "the individual interest in avoiding disclosure of personal matter." *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 762 (1989) (citation omitted). In holding that Exemption 7(C) also protects the "personal privacy" interests of corporations, the decision below relied on the APA's definition of "person," which includes "an individual, partnership, corporation, association, or public or private organization other than an agency." 5 U.S.C. § 551(2). The relevant term in Exemption 7(C), however, is not "person," but "personal privacy."

FOIA does not define"personal privacy" or either of its component words. "When a term is undefined, [the Court] give[s] it its ordinary meaning." *United States v. Santos*, 553 U.S. 507, 511 (2008). The ordinary meaning of "personal privacy," as derived from the meanings of its words and as reflected in this Court's and Congress's use of the term, encompasses only the privacy interests of human beings. Indeed, the Third Circuit cited no instance in which the term "personal privacy" has been used to describe the privacy interests of a corporation or other business enterprise.

When Congress intends to give a word a technical meaning, it does so expressly. The Third Circuit's contrary approach of incorporating the technical meaning of a defined word into undefined variants of that word would cause confusion and lead to absurd results.

II. FOIA's history, structure, and purpose all confirm that Exemption 7(C) protects only human privacy interests. Exemption 7(C) was intended to extend to investigative files the protections given to personnel, medical, and similar files by Exemption 6, which applies only to records relating to individuals. In contrast, corporate interests in confidentiality are protected by FOIA Exemption 4, which applies to trade secrets and confidential or privileged commercial and financial information. Moreover, the interests protected by FOIA's personal privacy exemptions are uniquely human interests that corporations do not share. Corporations and other inanimate entities cannot feel embarrassed or dishonored if their "privacy" is invaded.

Exempting agency records on the ground that they would "embarrass" corporations would undermine FOIA's goals of opening government action to the light of public scrutiny. Particularly in light of this Court's direction that FOIA's exemptions are to be narrowly construed, "personal privacy" should be interpreted to protect only individuals, not institutions.

ARGUMENT

I. "Personal Privacy" Refers to the Privacy of Human Beings.

A. The Plain Meaning of "Personal Privacy" Is Limited to the Privacy of Individuals.

The ordinary meaning of "personal privacy" includes only the privacy interests of human beings.

1. The word "privacy" generally connotes individual, rather than institutional, interests. The concept of a right to privacy is often traced back to Samuel Warren's and Louis Brandeis's seminal article on privacy, which discussed the need to protect "the privacy of the individual" and "the acts and sayings of a man in his social and domestic relations." Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 197, 214 (1890). The article located the right to privacy in the individual's right to an "inviolate personality." *Id.* at 205. As the right to privacy was developed in the common law, it continued to be limited to individuals. Just a few years before FOIA was enacted, Dean Prosser noted that "[i]t seems to be generally agreed that the right of privacy is one pertaining only to individuals, and that a corporation or a partnership cannot claim it as such[.]" William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 408-09 (1960). Similarly, the Restatement (Second) of Torts limits actions for invasion of privacy (except for appropriation of one's name or likeness) to the invasion of privacy of an individual, noting that a "corporation, partnership or unincorporated association has no personal right of privacy." Restatement (Second) of Torts § 6521, Comment c (1977). Congress's decision to use the word "privacy" in

Exemption 7(C) should be read against this background in which privacy has generally been associated with individual, as opposed to institutional, interests. *Cf. Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157, 166 (2004) ("We can assume Congress legislated against this background of law, scholarship, and history when it enacted FOIA and when it amended Exemption 7(C) to extend its terms.").[3]

To be sure, as AT&T has noted, this Court has used the term "privacy" in describing corporations' Fourth Amendment right to be free from unreasonable searches and seizures. *See, e.g., G.M. Leasing Corp. v. United States*, 429 U.S. 338, 354 (1977). Even in that context, however, it has emphasized that "corporations can claim no equality with individuals in the enjoyment of a right to privacy." *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

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[3] *See also Reporters Comm.*, 489 U.S. at 763 & n.16 (in discussing the personal privacy protections of Exemption 7(C), looking to the "common law and the literal understandings of privacy" and citing "A. Breckenridge, The Right to Privacy 1 (1970) ('Privacy, in my view, is the rightful claim of the individual to determine the extent to which he wishes to share of himself with others. . . . It is also the individual's right to control dissemination of information about himself'); A. Westin, Privacy and Freedom 7 (1967) ('Privacy is the claim of individuals . . . to determine for themselves when, how, and to what extent information about them is communicated to others'); Project, Government Information and the Rights of Citizens, 73 Mich. L. Rev. 971, 1225 (1974-1975) ('[T]he right of privacy is the right to control the flow of information concerning the details of one's individuality')").

Moreover, to the extent there is any ambiguity about the meaning of "privacy" standing alone, the modifier "personal" in Exemption 7(C) removes that ambiguity. Congress did not protect all privacy interests in Exemption 7(C); it protected only those of a "personal" nature. And only human beings have "personal privacy" interests.

"Personal" means "[o]f, pertaining to, concerning or affecting the individual person or self (as opposed, variously, to other persons, the general community, etc., or to one's office, rank, or other attributes)." 11 *Oxford English Dictionary* 599 (2d ed. 1989) (also defining personal as "individual; private; one's own"); *see also* 7 Oxford English Dictionary 726 (1st ed. 1933) (same). The word is associated with "the qualities of human beings," often even with particularly intimate aspects of human life. *See, e.g, Black's Law Dictionary* 1029 (5th ed. 1979) (defining personal as "[a]ppertaining to the person; belonging to an individual; limited to the person; having the nature or partaking of the qualities of human beings, or of movable property"); *Black's Law Dictionary* 1300-01 (4th ed. 1951) (same); *Webster's Third New International Dictionary* 1686 (1976) (defining "personal" as "of or relating to a particular person: affecting one individual or each of many individuals[;] . . . relating to the person or body[;] . . . relating to an individual, his character, conduct, motives, or private affairs[;] . . . relating to or characteristic of human beings as distinct from things[;] . . . rational and self-conscious"); *Webster's Third New International Dictionary* 1686 (1961) (same). Thus, the word "personal" connects the words it modifies to particularly human interests.

Noting that many dictionaries use the word "person" in defining "personal," AT&T has argued that because "person" is defined in the APA to include corporations, "personal" must include corporate rights. *See* Cert. Opp. 22 (citing *Webster's Third New International Dictionary* 1686 (2002); *Webster's New International Dictionary* 1828 (2d ed. 1950)). But when dictionaries use the word "person" in the definition of "personal," they are referring to the ordinary meaning of "person," not to its definition in the APA. And it is beyond dispute that "person" "[i]n general usage, [is] a human being." *Black's Law Dictionary* 1028 (5th ed. 1979).

Simply put, "one cannot say that a corporation has a 'personal privacy.'" Kenneth Culp Davis, *Administrative Law Treatise* (1970 Supp.) § 3A.12. The adjective "personal" unambiguously limits the privacy rights protected by Exemption 7(C) to those of individuals.

2. Both Congress's and this Court's uses of the term "personal privacy" confirm that the term refers to the privacy rights of individuals. Although no statute uses the term "personal privacy" expressly to include the interests of artificial entities, Congress has frequently used "personal privacy" in contexts that are expressly limited to humans. For example, the Privacy Act addresses government handling of records maintained on individuals and defines "individual" to mean a United States citizen or an alien lawfully admitted for permanent residence. 5 U.S.C. § 552a(a)(2). The preface to the Privacy Act uses the term "personal privacy" to refer to the interests protected: "The purpose of this Act is to provide certain safeguards for an individual against an invasion of personal privacy[.]" *Privacy Act of 1974*, Pub.L. No. 93-579, § 2(B),

88 Stat. 1896. Thus, the Act plainly uses "personal privacy" to refer solely to human interests. *See also, e.g.*, 38 U.S.C. § 5705(b)(2) ("The name of and other identifying information regarding any individual patient or employee of the Department, or any other individual associated with the Department . . . shall be deleted from any record or document before any disclosure . . . if disclosure of such name and identifying information would constitute a clearly unwarranted invasion of personal privacy.").

Similarly, this Court has never used the term "personal privacy" to refer to the interests of a corporation. Rather, like Congress, the Court has used the term interchangeably with "individual privacy" and to refer to the interests of the "individual." *See, e.g.*, *The Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (noting that there might be a "zone of personal privacy within which the State may protect the individual from intrusion by the press"). And the Court has used the term to apply to uniquely human interests in human dignity, individual autonomy, and physical security. *See, e.g.*, *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977) (explaining that the right of "personal privacy" includes the right to make personal decisions relating to marriage, procreation and child rearing (citing *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977))).

The Court's use of the term "personal privacy" in FOIA cases is no exception. In these cases as well, the Court has used "personal" and "personal privacy" interchangeably with "individual" and "individual privacy" to refer to the interests of "individuals." *See, e.g.*, *Reporters Comm.*, 489 U.S. at 755 n.7 (paraphrasing "clearly unwarranted invasion of personal privacy" to mean that which "might otherwise offend an individual's privacy"); *U.S. Dep't of State v. Ray*, 502 U.S. 164, 174 (1991) ("Congress thus recognized that the policy of informing the public about the operation of its Government can be adequately served in some cases without unnecessarily compromising individual interests in privacy."); *Rose*, 425 U.S. at 372 ("[In Exemption 6], Congress sought to construct an exemption that would require a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act[.]"). And the Court has used the term to protect interests unique to human beings. *See, e.g., Favish*, 541 U.S. at 166 (holding that family members have a protectible personal privacy interest in death scene photographs, the release of which would impact their "peace of mind and tranquility").

In short, the phrase "personal privacy" refers to uniquely human interests. As this Court has recognized in the context of the privilege against compulsory self-incrimination, "[s]ince the privilege . . . is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation." *United States v. White*, 322 U.S. 694, 699 (1944). Corporate documents "embody no element of personal privacy." *Id.* at 700.

B. The APA's Definition of "Person" Does Not Alter the Meaning of "Personal Privacy."

The Third Circuit did not dispute that the ordinary, common-sense meaning of "personal privacy" includes only human privacy interests. Nonetheless, it held that "FOIA's text unambiguously indicates that a corporation may have a 'personal privacy' interest within the meaning of Exemption 7(C)." Pet. App. A at 13a. This is so, according to the court of appeals, because the word "person" is defined in the APA, which includes FOIA, to include a corporation (along with any other partnership, association, or public or private organization other than a federal agency). 5 U.S.C. § 551(2). Exemption 7(C), however, does not use the word "person." It uses the term "personal privacy." And although they are related, "personal" and "person" are not the same word. *See* Davis, *Administrative Law Treatise* § 3A.22 ("The definition of 'person' seems to me irrelevant because the exemption does not use that term.").

By interpreting "personal privacy" to include corporate interests, the Third Circuit disregarded the "seemingly obvious rule" that "[u]nless Congress explicitly states otherwise, '[courts must] construe a statutory term in accordance with its ordinary or natural meaning.'" *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 184 (2003) (Thomas, J., dissenting) (quoting *FDIC v. Meyer*, 510 U.S. 471, 476 (1994)); *see also, e.g., Hamilton v. Lanning*, 130 S. Ct. 2464, 2471 (2010) ("'When terms used in a statute are undefined, we give them their ordinary meaning.'" (quoting *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995))); 2A N. Singer & J. Singer, *Sutherland on Statutory Construction* § 46:1 (7th ed. 2007) ("In the absence of a specific indication to the contrary, words used in the statute will be given their common, ordinary and accepted meaning[.]"). Here, Congress did not expressly define "personal privacy" or either of its component words. Accordingly, "personal privacy" should have been given its ordinary, natural meaning, which is limited to the privacy rights of individuals.

The well-established rule that words are to be given their ordinary meaning unless they are expressly defined otherwise reduces opportunities for misunderstandings between Congress and the courts by making it absolutely clear when a court should ignore the ordinary meaning of a statutory term: that is, when Congress has expressly given that term a different meaning. Indeed, when Congress has intended to give a variant of a defined term the same technical meaning as the defined term, it has done so expressly. *See, e.g.*, 29 U.S.C. § 203(k) (defining "sale" and "sell"); 8 U.S.C. § 1101(a)(13)(A) (defining "admission" and "admitted"); 39 U.S.C. § 3201(3), (4) (defining "franked mail" by reference to the defined term "frank"); 7 U.S.C. § 6202(3), (4) (defining "handler" by reference to the defined term "handle"); 15 U.S.C. § 375(5), (6) (defining "delivery seller" by reference to the defined term "delivery sale"). Moreover, "Congress has often used [the] drafting technique [of] repeating a discretely defined word . . . when it intends to incorporate the definition of a particular word into the definition of a compound expression." *Burgess v. United States*, 553 U.S. 124, 130-31 (2008) (citing 15 U.S.C. § 1672(a)-(b) (defining "earnings" and then defining "disposable earnings" as "that part of the earnings" meeting certain criteria); 18 U.S.C. § 1956(c)(3)-(4) (defining "transaction" and then defining "financial transaction" as "a transaction which" meets certain criteria); § 1961(1), (5) (2000 ed. and Supp. V) (defining "racketeering activity" and then defining "pattern of racketeering activity" to require "at least two acts of racketeering activity")).

In contrast, the Third Circuit's approach of giving words the technical meaning assigned to related, but different, words would create uncertainty over how similar in spelling, origin, and usage words must be for Congress's definition of one word to constitute a definition of another. The lack of a clear line is apparent even in the decision below. Both "personnel" and "personal" share a common root—"person." Following the Third Circuit's approach, "personnel" should be defined according to the APA's definition of "person," such that "personnel files," as used in Exemption 6, should include files on all entities within the scope of the APA's definition of person. Even the Third Circuit agreed, however, that "only individuals (and not corporations) may be the subjects" of "personnel and medical files." Pet App. A at 13a. The court provided no explanation for adopting the ordinary meaning of "personnel," but rejecting the ordinary meaning of "personal privacy."

The Third Circuit's rationale for holding that "personal" includes "corporate," and therefore that "personal privacy" includes "corporate privacy," was that "it would be very odd indeed for an adjectival form of a defined term *not* to refer back to that defined term." Pet. App. A at 11a (emphasis in original). On the contrary, it is the Third Circuit's rule that would often lead to "very odd," indeed even absurd, results. The word "person" is defined over 150 times in the U.S. Code, sometimes to include corporations, associations, and governmental entities, and sometimes not. The word "personal" is used hundreds, if not thousands of time, in statutes that define "person" to include corporations or organizations. These uses include, among many others, personal employees, 8 U.S.C. § 1101(a)(15)(A)(iii), personal safety, *id.* § 1101(a)(27)(G), personal interview, *id.* § 1186a(c)(1)(B), personal service, *id.* § 1229(a)(1), personal care, *id.* § 1231(f), personal possession, *id.* § 1304(e), personal property, *id.* § 1353, personal contact information, *id.* § 1375a(d)(1), personal injury, 15 U.S.C. § 1193(a), personal responsibility contract, 42 U.S.C. § 603(a)(5)(C)(iii)(III), personal identifiers, *id.* § 653(j)(5), personal and emotional support, *id.* § 677(4), personal medical records, *id.* § 1320a-4(c), personal effects, *id.* § 1382b(a)(2)(A), personal funds, *id.* § 1395i-3(c)(1)(B), personal comfort items, *id.* § 1395y(a)(6), and personal hygiene, *id.* § 1396b(q)(4)(B)(ii).

Interpreting "personal" according to a statutory definition of the term "person" would be harmless, albeit ridiculous, with respect to many of these provisions. In other cases, however, such an interpretation would clearly undermine congressional intent. For example, person is defined as including corporations or organizations in many statutory provisions that refer to "personal injury." *See, e.g.*, 8 U.S.C. § 1101(b)(3); 15 U.S.C. § 1261(e); 33 U.S.C. § 1321(a)(7). Under the Third Circuit's analysis, "personal injury" in these sections would include injury to corporations or organizations. It is extremely unlikely, however, that when Congress defined a "serious criminal offense" in 8 U.S.C. § 1101(h)(3) to include reckless driving that "involves personal injury to another," it intended to include reckless driving that injures an organization. Or that, in defining a "hazardous substance" in 15 U.S.C. § 1261(f)(1)(A) to include a substance that, along with other criteria, "may cause substantial personal injury or substantial illness" as a result of its forseeable use, it intended to include substances that may injure corporations. Or that, in allowing a person to be liable for damages for "personal injury or wrongful death" that results from certain actions relating to oil discharges in 33 U.S.C. § 1321(c)(4)(B)(iii), Congress intended "personal injury" to refer to all injuries to individuals, firms, corporations, associations, and partnerships.

Similarly, the term "personal property" has the accepted legal meaning of "[a]ny movable or intangible thing that is subject to ownership and not classified as real property." *Black's Law Dictionary* 1337 (9th ed. 2009). Several statutes that define "person" also refer to "personal property." *See, e.g.*, 8 U.S.C. §§ 1101(b)(3) (defining "person"), 1353 (referring to "personal property"), 1375c(b)(2)(C) (same); 42 U.S.C. §§ 1301(a)(3) (defining "person"); 411(a)(1) (referring to "personal property"), 416(h)(1)(a)(ii) (same), 666(4)(A) (same), 1396p(b)(4)(A), (B) (same); 42 U.S.C. § 6903(15) (defining "person"); 6903(16) (referring to "personal property"). Under the Third Circuit's rule that the definition of "personal" is tied to the statutory definition of "person," the term "personal property" in each of these statutes would mean all the property belonging to any "person," which would include real property. Such a reading runs counter to the accepted meaning of "personal property" and would render statutory language superfluous in the many instances in which a provision references both real and personal property. *See, e.g.*, 42 U.S.C. § 666(4)(A), *id.* § 1396p(4)(A), *id.* § 6903(16).

As the definition of "person" in the APA demonstrates, Congress knew how to define words to include corporations or corporate interests when it wanted to do so. Congress did not do so with respect to "personal" or "personal privacy." This Court need not break new ground to reject the Third Circuit's rule of statutory interpretation. It need only apply the longstanding rule that unless expressly defined otherwise, "words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979).

II. In FOIA, "Personal Privacy" Carries Its Ordinary Meaning, Referring Solely to Human Interests.

FOIA's legislative history, the role of Exemption 7(C) in the context of the statute as a whole, and the purposes of both Exemption 7(C) and FOIA overall all confirm that "personal privacy" in Exemption 7(C) carries its ordinary, natural meaning.

A. Exemption 6 and FOIA's Legislative History Demonstrate that Congress Intended "Personal Privacy" to Refer Solely to the Privacy of Individuals.

As explained above, the plain meaning of "personal privacy" is limited to the privacy of individuals. To the extent any doubt remains about the meaning of the term in Exemption 7(C), however, FOIA's legislative history confirms that "personal privacy" in 7(C) refers solely to the privacy of human beings.

1. FOIA's legislative history demonstrates that Congress intended Exemption 7(C) to incorporate the privacy interests addressed in Exemption 6, which are limited to individual privacy interests.[4]

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[4] This Court has often looked to legislative history in interpreting FOIA. *See, e.g.*, *FBI v. Abramson*, 456 U.S. 615,

(continued...)

When FOIA was enacted in 1966, the only exemption to mention personal privacy was Exemption 6, which protects from mandatory disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The legislative history of Exemption 6 makes clear that, in crafting an exemption that protects "personal privacy," Congress was concerned about *individuals'* privacy interests. The House Report states that the exemption was "intended to cover detailed Government records on an individual which can be identified as applying to that individual." H.R. Rep. No. 1497, at 11; *see also Wash. Post*, 456 U.S. at 599 ("The House Report explains that the exemption . . . seeks to protect individuals."). Likewise, the Senate Report provides that "[t]he phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information." S. Rep. No. 813, at 9. And in discussing the types of records that the exemption would protect, both the House and Senate Reports mention the Veterans' Administration, the Department of Health, Education, and Welfare, and the Selective Service—agencies whose files "contain[] intimate details about millions of citizens." H.R. Rep. No. 1497, at 11.

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[4](...continued)
626-31 (1982) ; *NLRB v. Robbins Tire & Rubber* Co., 437 U.S. at 224-36; *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 599-602 (1982) ; *Rose*, 425 U.S. at 360-82.

Thus, in enacting Exemption 6, "Congress sought to construct an exemption that would require a balancing of the *individual*'s right of privacy against the preservation of the basic purpose of [FOIA].'" *Rose*, 425 U.S. at 372 (emphasis added). Accordingly, "the text of the exemption requires the Court to balance 'the individual's right of privacy' against the basic policy of opening 'agency action to the light of public scrutiny.'" *Ray*, 502 U.S. at 175 (quoting *Rose*, 425 U.S. at 372).

The Third Circuit stated that if Exemption 6 protects only individual privacy, it is because of Exemption 6's threshold limitation to "personnel and medical files and similar files," not because of its reference to "personal privacy." Pet App. A at 13a. Both the House and Senate Reports, however, tie Exemption 6's focus on the individual to the "clearly unwarranted invasion of personal privacy" language. As the House Report explains, "[t]he limitation of a 'clearly unwarranted invasion of personal privacy' . . . exclud[es] those kinds of files the disclosure of which might harm the individual." H.R. Rep. No. 1497, at 11; *see also* S. Rep. No. 813, at 9 ("The phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the public's right to governmental information."). This Court has read Exemption 6 in a similar fashion. *See Rose*, 425 U.S. at 372 (noting that the "device adopted to achieve that balance" "of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act" "was the limited exemption, where privacy was threatened, for 'clearly unwarranted' invasions of personal privacy"); *id.* at

384-85 (Burger, J., dissenting) (noting Congress's "definition of a 'clearly unwarranted invasion of personal privacy' as equated with 'protect(ing) an individual's private affairs from unnecessary public scrutiny'" (emphasis removed) (quoting S. Rep. No. 813, at 9)).

In any event, particularly given the threshold language—which this Court has interpreted to include all "information which applies to a particular individual," because "[t]he exemption [was] intended to cover detailed Government records on an individual which can be identified as applying to that individual," *Wash. Post*, 456 U.S. at 602 (quoting H.R. Rep. No. 1497, at 11)—it is beyond question that Exemption 6 was intended to protect the privacy of human beings only. And cases from the years between FOIA's enactment and the enactment of Exemption 7(C) in 1974 equated the term "personal privacy" in Exemption 6 with "individual privacy." *See, e.g.*, *Getman v. NLRB*, 450 F.2d 670, 674, 675 (D.C. Cir. 1971) (explaining that "Exemption (6) requires a court reviewing the matter de novo to balance the right of privacy of affected individuals against the right of the public to be informed," and that "the real thrust of Exemption (6) is to guard against unnecessary disclosure of files . . . which would contain 'intimate details' of a 'highly personal' nature") (citations omitted); *Wine Hobby USA, Inc. v. U.S. Internal Revenue Serv.*, 502 F.2d 133, 136 (3d Cir. 1974) (agreeing that "'Exemption (6) necessarily requires the court to balance a public interest purpose for disclosure of personal information against the potential invasion of individual privacy'" (quoting *Getman*, 450 F.2d at 677 n.24)).

In 1974, in response to D.C. Circuit cases that had broadly interpreted Exemption 7, Congress amended the exemption to remove from its scope investigatory records the disclosure of which would not cause any harm. *See FBI v. Abramson*, 456 U.S. at 621-22 (explaining that the exemption "underwent a major revision in 1974" because some courts had interpreted the prior version as "permitt[ing] the unlimited withholding of files merely by classifying them as investigatory files compiled for law enforcement purposes"). At that time, Congress imported Exemption 6's "unwarranted invasion of personal privacy" language into Exemption 7(C).

In incorporating Exemption 6's language, Congress sought to extend Exemption 6's protections for individual privacy into the context of investigative records. As Senator Hart explained in introducing the amendment to Exemption 7 on the Senate floor, "the protection for personal privacy [in 7(C)] . . . is a part of the sixth exemption in the present law." 120 Cong. Rec. 17033 (May 30, 1974) (Statement of Sen. Hart). "By adding the protective language here, we simply make clear that the protections in the sixth exemption for personal privacy also apply to disclosure under the seventh exemption." *Id.*; *see also id.* at 17040 (memorandum letter from Sen. Hart) (explaining in a letter on the amendments to Exemption 7 that whether "disclosure is an unwarranted invasion of personal privacy . . . is a determination courts make all the time; indeed the sixth exemption in the Act presently involves just such a task"). Accordingly, this Court has looked to its case law on Exemption 6 in interpreting Exemption 7(C). *See Reporters Comm.*, 489 U.S. at 768 (explaining that although *Department of Air Force v. Rose* dealt with Exemption 6, "much of our discussion in *Rose* is applicable here"); *see also, e.g.*, *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005) ("[I]dentical words used in different parts of the same statute are generally presumed to have the same meaning.").

As originally proposed, Exemption 7(C), like Exemption 6, would have required a "clearly unwarranted" invasion of personal privacy to justify withholding records. President Ford, however, expressed concern "that an individual's right to privacy would not be appropriately protected by requiring the disclosure of information contained in an investigatory file about him unless the invasion of individual privacy is *clearly unwarranted*." Letter from Gerald R. Ford to Edward M. Kennedy, Aug. 20, 1974, *reprinted at* 120 Cong. Rec. 34162-34163 (Oct. 7, 1974) (emphasis in original); *see also id.* ("I believe now is the time to preclude the Freedom of Information Act from disclosing information harmful to the privacy of individuals."). In response to President Ford's concern for the "privacy of individuals," the conference committee on the amendments removed the word "clearly" from Exemption 7(C). Letter from Edward S. Kennedy and William S. Moorhead to Gerald R. Ford, Sept. 23, 1974, *reprinted at* 120 Cong. Rec. 34163-34164 (Oct. 7, 1974). Thus, Exemption 7(C) is more protective of the "personal privacy" interests it covers than is Exemption 6. If Exemption 7(C) were interpreted to protect corporate interests, corporations would be given broader protections during the consideration of whether to release law enforcement records than individuals are given during the consideration of whether to release their medical files.

That can hardly be what Congress intended in responding to President Ford's concerns about individual privacy.

2. The examples that members of Congress used to explain the need to amend Exemption 7 demonstrate that the amendment was intended to ensure that investigatory records concerning whether companies complied with legal requirements would be publicly available, not to protect companies from embarrassment or reputational harm due to the release of such records. In introducing the amendment on the Senate floor, Senator Hart explained that he and the 14 other original co-sponsors of the amendment were introducing it out of concern that "under the interpretation by the courts in recent cases" "such information as meat inspection reports, civil rights compliance information, and medicare nursing home reports will be considered exempt under the seventh exemption." 120 Cong. Rec. 17033 (May 30, 1974) (Statement of Sen. Hart); *see also* 120 Cong. Rec. 36878 (Nov. 21, 1974) (Statement of Sen. Bayh) (noting loophole in law enforcement exemption that "came to be interpreted as including such things as meat inspection reports, reports concerning safety in factories, correspondence between the National Highway Traffic Safety Administration and the automobile manufacturers concerning safety defects, and reports on safety and medical care in nursing homes receiving federal funds").

Similarly, Representative Reid explained on the House floor that "one can easily see the need for plugging the loophole in the old law," "[w]hen one considers that in the past the law enforcement exemption has been construed by agencies to preclude access to meat inspection reports, OSHA safety reports, airline safety analyses and reports on medical care in federally supported nursing homes." 120 Cong. Rec. 36626 (Nov. 20, 1974). Indeed, one of the cases that the 1974 amendments was specifically intended to overturn, *Ditlow v. Brinegar*, 494 F.2d 1073 (D.C. Cir. 1974), denied access to correspondence concerning "safety defect investigations" between automobile manufacturers and the agency that regulated them because they were contained in investigatory files compiled for law enforcement purposes. *Id.* at 1074; *see FBI v. Abramson*, 456 U.S. at 627 & n.11 (explaining that the amendments to Exemption 7 were in reaction to a line of D.C. Circuit cases including *Ditlow*). Interpreting Exemption 7(C) to protect corporate interests would defeat Congress's purpose of providing public access to records concerning investigations into corporate compliance with the law.

3. In addition to mentioning "personal privacy" in Exemptions 6 and 7(C), FOIA includes language about personal privacy in Section 552(a)(2). That section provides that "[t]o the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or [records likely to be requested again]." 5 U.S.C. § 552(a)(2). The legislative history of that provision, like that of Exemption 6, shows that Congress's focus was on individuals, not corporations. *See* H.R. Rep. No. 1497, at 8 (explaining that the provision "solves the conflict between the requirement for public access . . . and the need to protect individual privacy," by "permit[ting] an agency to delete personal identifications from its public records 'to prevent a clearly unwarranted invasion of personal privacy'"); S. Rep. No. 813, at 7 (noting that the

provision "balance[s] the public's right to know with the private citizen's right to be secure in his personal affairs"). And this Court has likewise interpreted that provision to protect *individual* privacy. *See Reporters Comm.*, 489 U.S. at 756 n.7 (explaining, in case on scope of Exemption 7(C), that "Congress employed similar language earlier in the statute to authorize an agency to delete identifying details that might otherwise offend an individual's privacy").

As part of the debate over another aspect of the 1974 amendments, Senator Dole entered into the record the full opinion in *Washington Research Project v. Department of Health, Education, and Welfare*, 366 F. Supp. 929 (D.D.C. 1973), *aff'd in part on other grounds*, 504 F.2d 238 (D.C. Cir. 1974), in which the court explained that Section 552(a)(2)'s "personal privacy" language does not apply to corporate interests. Citing the "personal privacy" language, the court stated that "the defendants may only delete that minimum amount of information necessary to conceal the identity of those individuals whose privacy is threatened." *Id.* at 937. "Nor may the identity of an institutional applicant be concealed," the court continued, "because the right of privacy envisioned in the Act is personal and cannot be claimed by a corporation or association." *Id.* at 937-38 (citing K. Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 781, 799 (1967)).

4. In 1986, Congress further amended Exemption 7(C) to make it even more protective of the privacy interests it covers. *See* Freedom of Information Reform Act, Pub. L. No. 99-570, § 1802, 100 Stat. 3207 (1986). Whereas the exemption originally applied to records the release of

which would "constitute an unwarranted invasion of personal privacy," it now applies to records the release of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). In addition, Congress amended Exemption 7's threshold language, changing "investigatory records compiled for law enforcement purposes" to "records or information compiled for law enforcement purposes." *Id.* When the language was amended in 1986, Exemption 7(C) was already understood to cover only individual interests. *See, e.g.,* U.S. Dep't of Justice, *FOIA Update,* Vol. III, No. 4, at 5 (May 1982) ("It is well settled that the FOIA's privacy exemptions provide personal privacy protection and cannot be invoked to protect the interests of a corporation or association."); U.S. Dep't of Justice, *Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act* 9 (February 1975) ("The phrase 'personal privacy' pertains to the privacy interests of individuals. [It] does not seem applicable to corporations or other entities."); *cf. Cohen v. EPA*, 575 F. Supp. 425, 429 (D.D.C. 1983) ("[Exemption 7(C)'s] privacy exemption does not apply to information regarding professional or business activities."). Nonetheless, Congress maintained Exemption 7(C)'s "unwarranted invasion of personal privacy" language, even as it amended other parts of the Exemption.

B. Exemption 4 Supports Reading Exemption 7(C) to Apply Only to Individuals.

Reading Exemption 7(C) in the context of FOIA's other exemptions further supports interpreting "personal privacy" in Exemption 7(C) to apply only to the privacy of human beings. FOIA Exemption 4 exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). This provision, which unquestionably applies to corporations because it uses the defined term "person," provides the protection that Congress considered appropriate for corporate confidentiality interests, which are inherently "commercial" rather than "personal." And, indeed, the FCC invoked Exemption 4 in withholding certain AT&T documents. Pet. App. B at 21a.

Exemption 4 reflects Congress's careful balance of business confidentiality and public disclosure. The exemption protects "persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication." *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 767-68 (D.C. Cir. 1974). But the harm against which Exemption 4 protects is only that which "flow[s] from the affirmative use of proprietary information *by competitors*," not any harm that might arise from bad publicity. *Public Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983) (citation omitted) (emphasis in original). The exemption does not shield companies from "mere embarrassment in the marketplace or reputational injury." *United Techs. Corp. v. U.S. Dep't of Defense*, 601 F.3d 557, 564 (D.C. Cir. 2010).

Viewed together, it is clear that Exemption 4 is the means through which FOIA protects business interests, while Exemptions 6 and 7(C) are the means through which FOIA protects individual interests. This Court should not upset the balance Congress struck between business confidentiality and the need for public disclosure by shoehorning protection for corporate interests into the exemptions used to protect individual interests.

C. Expanding the Scope of Exemption 7(C) Would Undermine FOIA's Purposes and Would Not Further the Purposes of Exemption 7(C).

1. Interpreting "personal privacy" to include corporate interests would not promote the interests protected by Exemption 7(C). In describing the interests protected by FOIA's personal privacy exemptions, this Court has focused on interests unique to human beings. In *Rose*, the Court considered the dishonor associated with being identified in honor-code hearing summaries. 425 U.S. 352. In *Ray*, the Court expressed concern that releasing identifying information from interviews with Haitians who had illegally entered the United States and been involuntarily returned to Haiti would make public "highly personal information regarding marital and employment status, children, living conditions and attempts to enter the United States," and might subject the interviewees and their families to "embarrassment" and "the danger of mistreatment." 502 U.S. at 175, 176 & n.12. In *Reporters Committee*, the Court emphasized individuals' right to control personal information about themselves, a right rooted in human dignity and autonomy. 489 U.S. at 762-63. In *United States Department of Defense v. Federal Labor Relations Authority*, the Court discussed the special privacy of the home and how "people simply do not want to be disturbed at home by work-related matters." 510 U.S. 487, 501 (1994). And in *Favish*, the Court protected family members' personal privacy interests in a relative's death scene photographs, the release of which would disturb their "peace of mind and tranquility." 541 U.S. at

166, 170. The personal privacy interests this Court has held protected by FOIA are not shared by corporations.

In support of its conclusion that corporations have "personal privacy" interests, the Third Circuit stated that "[c]orporations, like human beings, face public embarrassment, harassment, and stigma" because of their involvement in law enforcement investigations, and that "a corporation . . . has a strong interest in protecting its reputation." Pet. App. A at 14a. Corporations, however, are incapable of feeling "embarrassed," "harassed," or "stigmatized" due to their involvement in law enforcement investigations, because corporations do not feel at all. The court of appeals also noted that "a corporation . . . has a strong interest in protecting its reputation."*Id.* at 15a. It analogized that interest to "'intimate' details" of human life, "including 'marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, and reputation." *Id.* at 15a (quoting *Wash. Post Co. v. U.S. Dep't of Justice*, 863 F.2d 96, 100 (D.C. Cir. 1988)). But a corporation's interest in protecting its reputation is far different from the interests this Court has protected under Exemptions 6 and 7(C). Corporations do not seek to protect their reputations out of embarrassment or fears of dishonor or threats to their physical safety (none of which they are capable of feeling), but out of interest in their bottom lines.

The Third Circuit also concluded that according corporations personal privacy rights would serve Exemption 7(C)'s "purpose of providing broad protection to entities involved in law enforcement investigations in order to encourage cooperation with federal regulators."

Pet. App. A at 14a. The 1974 amendment to Exemption 7, however, demonstrates that Congress did not intend to exempt from disclosure all records in law enforcement files in order to give broad protection to investigated entities. Furthermore, Exemption 7 has other subparagraphs designed to ensure cooperation by sources Congress feared might not otherwise cooperate. *See, e.g*, 5 U.S.C. § 552(b)(7)(D) (exempting law enforcement records that "could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis"); *see also FBI v. Abramson*, 456 U.S. at 630 (indicating that Exemption 7's other subparagraphs, rather than 7(C), "compensate for the potential disruption in the flow of information to law enforcement agencies by individuals who might be deterred from speaking because of the prospect of disclosure").

Moreover, from the time of Exemption 7(C)'s enactment until the decision below, "personal privacy" was widely and consistently interpreted to include only individual human interests, but the FCC was able to obtain the records at issue in this case. And, notably, the government—the petitioner here—does not agree that an expanded interpretation of Exemption 7(C) is needed to assist its law enforcement efforts.

2. Interpreting "personal privacy" to include corporate interests would undermine FOIA and its government accountability goals. In enacting FOIA, Congress sought "to open agency action to the light of public scrutiny." *Rose*, 425 U.S. at 372 (citation omitted). The purpose of FOIA is "to ensure an informed citizenry, vital to the

functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. at 242. Adopting the lower courts interpretation of "personal privacy," however, would remove a wide swath of records that are directly related to this goal, and that have historically been released, from the "light of public scrutiny."

Records relating to agency investigations of suspected corporate wrongdoing go directly to the heart of FOIA's accountability goals. They shed light on how the agency interacts with members of the industry it regulates, how it responds to wrongdoing by regulated entities, and whether it treats regulated corporations equally and fairly. Under the court of appeals' definition of "personal privacy," however, these records may be exempt from disclosure whenever they would "embarrass" a company. The examples Senator Hart provided when he introduced the amendment that added Exemption 7(C) to FOIA demonstrate the problem. Senator Hart explained that he was introducing the amendment out of "fear that such information as meat inspection reports, civil rights compliance information, and medicare nursing home reports will be considered exempt under the seventh exemption." 120 Cong. Rec. 17033 (May 30, 1974) (Statement of Sen. Hart). If corporations have protected "personal privacy" interests under Exemption 7(C), however, unsanitary meat processing plants, companies that discriminate, and abusive or fraudulent nursing homes will all be able to claim that releasing records about their wrongdoing would "embarrass" them and invade their personal privacy. The public thereby would be denied information both about those practices themselves and about how the government responded to them.

For information to be exempt under Exemption 7(C), the privacy interest must outweigh the public interest, and not all law enforcement records involving corporations will be exempt under that balancing. However, once a personal privacy interest is asserted under the exemption, it can be difficult to defeat. This Court has stated that, for an invasion of privacy not to be unwarranted, "the citizen must show that the public interest sought to be advanced is a significant one" and that the requested "information is likely to advance that interest." *Favish*, 541 U.S. at 172. And lower courts have sometimes articulated extremely narrow notions of what can be included on the public interest side of the balancing test. In *SafeCard Services, Inc. v. SEC*, 926 F.2d 1197, 1206 (D.C. Cir. 1991), for example, the D.C. Circuit stated that, to overcome a privacy interest in names and addresses of individuals under Exemption 7(C), a requester must present "compelling evidence" that the agency is engaged in illegal activity. Were such a rule applied to the identities of regulated corporations, the public would not be able to obtain records about government investigations into corporate wrongdoing unless the requester *already* had compelling evidence of agency wrongdoing. Removing the ability to determine whether agencies fairly investigate the industries they regulate is not what Congress had in mind when it amended Exemption 7 specifically to clarify that investigative files are not automatically exempt from disclosure.

The records at issue in this case illustrate the importance of access to investigative records to holding the agency accountable in the performance of its regulatory duties. For many years, the FCC Inspector General has reported that the E-Rate program, which distributes up to $2.25 billion per year, 47 C.F.R. § 54.507(a), has been a target for waste, fraud and abuse.[5] The FCC's management of the E-Rate fund has likewise been subject to criticism by both the Government Accountability Office and Congress.[6] AT&T has been sued for violations of the False Claims Act in connection with its billing and receipt of E-Rate Funds, paying more than $8.2 million to settle charges in Indiana and $1.4 million to settle charges in Missouri.[7] Although the FCC has debarred other vendors from participation in the E-Rate program,[8] the FCC

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[5] *See, e.g.*, FCC Office of Inspector General Semiannual Report to Congress, October 1, 2009 through March 31, 2010 at 23 ("The E-Rate Program has been a prime target for fraud[.]"), available at http://www.fcc.gov/oig/oigreportssemiannual.html.

[6] *See, e.g.*, U.S. Government Accountability Office, *Concerns Regarding the Structure and FCC's Management of the E-Rate Program*, Statement of Mark L. Goldstein, Director, Physical Infrastructure Issues, GAO-05-439T (Mar. 16, 2005); U.S. Congress, House, Committee on Energy and Commerce, *Waste, Fraud, and Abuse Concerns in the E-Rate Program*, 109th Cong., 1st Sess., Committee Print 109-E (2005).

[7] *See* FCC Office of Inspector General Semiannual Report to Congress, October 1, 2008 through March 31, 2009 at 57; FCC Office of Inspector General Semiannual Report to Congress, October 1, 2009 through March 31, 2010 at 30.

[8] The FCC's rules require the FCC to debar or suspend an individual or corporation found civilly or criminally liable for, *inter*

(continued...)

Enforcement Bureau terminated its investigation into AT&T with a Consent Decree. Interpreting the "personal privacy" language of Exemption 7(C) to protect the Enforcement Bureau file from disclosure would shield from public view important information about how the FCC has managed and operated the E-Rate program.

This Court has noted that "Congress gave special consideration to the language in Exemption 7(C)." *Favish*, 541 U.S. at 166. The plain meaning of "personal privacy," FOIA's legislative history, Exemption 4, and the purposes of FOIA and its personal privacy exemptions all demonstrate that "personal privacy" in Exemption 7(C) refers only to the privacy interests of human beings. This Court should not upset the balance Congress chose between protecting individual privacy and opening investigative records to public scrutiny by extending Exemption 7(C)'s "personal privacy" protections to corporations.

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[8](...continued)
alia, making false claims related to activities associated with the E-Rate program. 47 C.F.R. § 54.8.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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November 2010

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
DEC 9 - 2010
OFFICE OF THE CLERK

No. 09-1279

IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Petitioners,

v.

AT&T INC., ET AL.,
Respondents.

**On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit**

BRIEF FOR RESPONDENT AT&T INC.

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QUESTION PRESENTED

Whether the court of appeals properly granted the petition for review and remanded the matter to the Federal Communications Commission ("FCC") for further proceedings, where the FCC had concluded that corporations are categorically excluded from the protections of Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(C), which prevents unwarranted invasions of "personal privacy," and where the statute defines the root word "person" to include "corporation[s]," *id.* § 551(2).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent AT&T Inc. states the following:

AT&T Inc. is a publicly held company that has no parent company, and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

Respondent CompTel—a trade association representing competitors of respondent AT&T Inc.—submitted a one-line request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(3), seeking documents that AT&T submitted to petitioner the Federal Communications Commission ("FCC" or "Commission"). AT&T provided those documents to the FCC as part of a confidential FCC investigation initiated after AT&T voluntarily and confidentially reported to the FCC irregularities in its billings in connection with a federal program. In granting CompTel's FOIA request, the FCC ruled that, as a categorical matter, corporations such as AT&T cannot have "personal privacy" within the meaning of FOIA's law-enforcement exemption, Exemption 7(C), 5 U.S.C. § 552(b)(7)(C), even though the statute defines "person"—the root of "personal"—to include corporations, *id.* § 551(2). Applying the statute's plain language to conclude that a corporation could have personal privacy interests under Exemption 7(C), the Third Circuit granted AT&T's petition for review of the FCC's order and remanded the case to the FCC to balance AT&T's privacy interest against the public interest in disclosure.

1. In August 2004, AT&T voluntarily and confidentially informed the FCC of concerns regarding certain invoices that one of its subsidiaries submitted to the independent administrator of a federal program designed to assist schools and libraries in obtaining affordable telecommunications services and Internet access. App. 2a-3a.[1] AT&T refunded to the independent administrator all amounts received under the questionable invoices, and it cancelled outstanding invoices that raised similar issues. *See* Consent Decree, *SBC Communications Inc.*, 19 FCC Rcd 24015, ¶ 3 (2004) ("Consent Decree").

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[1] "App." refers to the appendix accompanying the certiorari petition.

In response to AT&T's voluntary disclosure, the FCC's Enforcement Bureau conducted an investigation. App. 3a. In the course of its investigation, the Bureau directed AT&T to produce a wide range of documents. *Id.* Those documents included detailed written responses to the Bureau's interrogatories; names and job descriptions of AT&T employees involved in the arguably improper billing; completed invoice forms; internal AT&T emails (including documents attached to those emails) that provided cost, pricing, and billing information in connection with the services provided and that indicated how AT&T came to invoice the administrator for certain aspects of those services; emails describing details of discussions between AT&T and its customers; and AT&T's written views regarding whether and the extent to which its employees had violated AT&T's Code of Business Conduct. *Id.*

In December 2004, the FCC adopted a consent decree resolving its investigation; the order and consent decree involved no admission of wrongdoing by AT&T. Order, *SBC Communications Inc.*, 19 FCC Rcd 24014 (Enf. Bur. 2004). The Consent Decree, which is publicly available, states that AT&T had voluntarily informed the Enforcement Bureau that AT&T's subsidiary had invoiced the administrator (i) "in one funding year for services provided in another"; (ii) "for services it provided to certain schools and other entities for which it had not sought and obtained authorization"; and (iii) "for services that are not eligible for [federal] support." Consent Decree ¶ 3.

2. On April 4, 2005, CompTel submitted via email a one-sentence FOIA request demanding "[a]ll" materials in the Enforcement Bureau's investigative file. C.A. App. A27. CompTel did not reveal why it sought the contents of the Bureau's file. It has, however, long sought to use FCC investigations to tarnish AT&T's goodwill and reputation and to embarrass, harass, and stigmatize AT&T.[2] CompTel's members may have also desired to use the information in competing with AT&T.

After receiving notice of CompTel's request, AT&T submitted a letter opposing disclosure. C.A. App.

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[2] *See, e.g.*, Letter from Maureen Flood, Director, Regulatory & State Affairs, CompTel, to Dorothy Attwood, Chief, Common Carrier Bureau, FCC, and David Solomon, Chief, Enforcement Bureau, FCC, CC Docket No. 98-141, at 7 (Jan. 24, 2002) (charging AT&T with "flout[ing]" FCC rules and arguing that AT&T's supposed failure to implement internal controls "constitute[d] a willful omission that should be subject to criminal penalties, including a fine or imprisonment"), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512980842; Letter from H. Russell Frisby, Jr., President, CompTel, to Michael K. Powell, Chairman, FCC, CC Docket No. 01-194, at 1-2 (Aug. 31, 2001) (arguing, in a case in which AT&T voluntarily reported a concern that it may have violated FCC rules, that AT&T had "been caught red handed" and should be "swiftly and severely punish[ed]"), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512765282; *see also* Letter from H. Russell Frisby, Jr., President, CompTel, to David Solomon, Chief, Enforcement Bureau, FCC, CC Docket No. 01-88, at 1, 3, 7 (May 21, 2001) (charging that AT&T "is more than willing to falsify information," had engaged in "egregious conduct," had "'cheated'" the FCC, and deserved "severe sanctions"), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512567860.

A28-A36. AT&T explained that the internal documents that AT&T had produced to the Enforcement Bureau had been "compiled for law enforcement purposes" and were protected from disclosure under FOIA Exemption 7(C) and 47 C.F.R. § 0.457(g)(3). Exemption 7(C) provides that FOIA "does not apply to matters that are . . . records or information compiled for law enforcement purposes, . . . to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). AT&T explained that the word "personal" in Exemption 7(C) is the adjective form of "person." The Administrative Procedure Act ("APA"), which FOIA amended, defines "person" to include "an individual, partnership, corporation, association, or public or private organization other than an agency." *Id.* § 551(2).

On August 5, 2005, the Enforcement Bureau issued a letter ruling in which it rejected AT&T's reliance on Exemption 7(C). App. 34a-44a. The Bureau reasoned that "businesses do not possess 'personal privacy' interests as required for application" of that exemption. App. 42a-43a. The Bureau stated that, unless AT&T filed an application for review by the full Commission, it would produce the records CompTel requested, except to the extent those records revealed internal FCC communications, names and identifying information of particular AT&T employees, or what the Bureau considered to be confidential commercial information protected under FOIA Exemption 4, 5 U.S.C. § 552(b)(4), such as billing and payment dates, as well as costs and pricing data. App. 40a-44a.

On August 19, 2005, AT&T filed an application for review with the full Commission challenging the Enforcement Bureau's conclusion that Exemption 7(C) is categorically inapplicable to corporations. C.A. App. A47-A54.[3] On September 12, 2008, the FCC denied AT&T's application for review and ordered disclosure of AT&T's records as specified in the Bureau's decision. App. 19a-33a. The FCC concluded that, as a per se matter, a corporation has no "'personal privacy' interests within the meaning of Exemption 7(C)." App. 26a.

3. The Third Circuit granted AT&T's petition for review and remanded the case to the FCC. App. 1a-18a.[4]

The court began its analysis by noting that the FCC's interpretation of Exemption 7(C) is not entitled to deference, because "FOIA applies government-wide, and no one agency is charged with enforcing it." App. 9a-10a. Interpreting the statute de novo, the court rejected the FCC's categorical assertion that the phrase "personal privacy" in Exemption 7(C) excludes corporations. The court explained that FOIA's plain text compels the conclusion that corporations can have "personal privacy" under Exemption 7(C), because "'personal' is the adjectival form of 'person,' and FOIA defines 'person' to include a corporation." App. 11a; *see* 5 U.S.C. § 551(2). It further noted that another FOIA exemption—Exemption 7(F)—protects information that "could reasonably be expected to endanger the life or physical safety of any *individual*," 5 U.S.C. § 552(b)(7)(F) (emphasis added), demonstrating that "Congress knew how to refer solely to human beings (to the exclusion of corporations and other legal entities) when it wanted to." App. 12a.

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[3] CompTel filed its own application for review challenging the Enforcement Bureau's decision to withhold or redact certain categories of records. C.A. App. A55-A60. In October 2006, when the FCC had not ruled on either party's application for review, CompTel initiated a civil action in the District Court for the District of Columbia seeking disclosure. Compl., *CompTel v. FCC*, No. 1:06-cv-01718-HHK (D.D.C. filed Oct. 5, 2006); *see also* 5 U.S.C. § 552(a)(6)(A)(i), (C)(i). AT&T intervened and resisted disclosure. Since March 2008, that case has been stayed pending resolution of this proceeding. Memorandum Opinion and Order at 6, *CompTel v. FCC*, No. 1:06-cv-01718-HHK (D.D.C. Mar. 5, 2008).

[4] On AT&T's motion, which the FCC did not oppose, the court of appeals had granted a stay of the FCC's order pending appeal. App. 5a n.1. In its opinion, the court of appeals first addressed, and rejected, CompTel's contention that the court lacked jurisdiction to review the FCC's order. App. 6a-8a.

The Third Circuit also addressed the FCC's and CompTel's argument that, because FOIA Exemption 6—which protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(6)—applies only to individuals, and because the phrase "personal privacy" must have the same meaning in Exemptions 6 and 7, the phrase "personal privacy" in Exemption 7 must exclude corporations. Without accepting the premise that only individuals can invoke Exemption 6—an issue on which it "express[ed] no opinion," App. 13a—the court explained that Exemption 6 contains other language not found in Exemption 7(C)—namely, the phrase "personnel and medical files"—that could be read as limiting the application of Exemption 6 to natural persons. *Id.* Thus, the court reasoned, to the extent Exemption 6 does not protect corporations, it is not because the provision contains the phrase "personal privacy" but because other words in the statute arguably limit its application to human beings.

Having concluded that Exemption 7(C)'s language is "unambiguous[]," the Third Circuit did not reach the parties' disputes regarding statutory purpose, legislative history, and the applicability of cases from other circuits. App. 13a-14a. Even so, it observed that "interpreting 'personal privacy' according to its plain textual meaning serves Exemption 7(C)'s purpose of providing broad protection to entities involved in law enforcement investigations in order to encourage cooperation with federal regulators." App. 14a n.5.

Having concluded that the FCC's per se rule excluding corporations from invoking Exemption 7(C) could not be reconciled with the statutory text, the Third Circuit remanded the matter to the FCC to balance the public and private interests at stake to determine "whether disclosure 'could reasonably be expected to constitute an unwarranted invasion of personal privacy.'" App. 17a (quoting 5 U.S.C. § 552(b)(7)(C)).

4. The government's petition for rehearing and rehearing en banc was denied. App. 45a-46a. The Court granted the Solicitor General's petition for certiorari.

SUMMARY OF ARGUMENT

Exemption 7(C) provides that FOIA "does not apply to matters that are . . . records or information compiled for law enforcement purposes, . . . to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). The Third Circuit correctly concluded that the phrase "personal privacy" can encompass not only privacy of an individual but also privacy of a corporation.

A. The statute's plain language establishes that a corporation can have "personal privacy" within the meaning of Exemption 7(C). The ordinary meaning of the adjective "personal" is "[o]f or pertaining to a particular person." *Webster's New International Dictionary* 1828 (2d ed. 1950) ("*Webster's*"). Here, Congress has defined the root noun "person" to include both individuals and corporations. 5 U.S.C. § 551(2). Accordingly, the phrase "personal privacy" in Exemption 7(C) means the privacy of a particular person—i.e., an individual or a corporation.

The government does not deny the basic principle of grammar and usage that the adjective form of a noun takes its meaning from that noun. Even so, it maintains that the word "personal" relates only to individual human beings. To support that claim, the government eschews the primary dictionary definition of the word "personal" in favor of other definitions that refer to individuals. But none of those definitions suggests that "personal" is anything other than the adjective form of "person." Thus, in nonlegal usage, where a "person" is a human being, it is entirely unsurprising that the word "personal" is used to refer to human beings. But, in a legal context—and especially in the context of FOIA, a statute that defines "person" to include corporations—one has a different expectation: the word "personal" refers to both individuals and corporations, because the noun from which it is formed also includes both individuals and corporations. Any other interpretation would improperly disregard the express statutory definition of "person."

B. Common legal usage belies the government's claim that the words "personal privacy" cannot be used in connection with corporations. For at least 140 years, it has been "well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." *Monell v. Department of Social Servs.*, 436 U.S. 658, 687 (1978). Accordingly, privacy protections and other rights have been extended to corporations in many areas of law. Corporations have privacy rights under the Fourth Amendment and are rights-bearing persons under the First Amendment, the Due Process Clause, the Equal Protection Clause, and the Double Jeopardy Clause. The Fourth Amendment and the Double Jeopardy Clause, in particular, protect the same types of privacy and reputational interests that Exemption 7(C) is designed to safeguard.

The government nevertheless maintains that corporate privacy rights were unheard of before the decision below. Its principal support for that bold claim comes from cases holding that corporations cannot sue in tort for invasion of privacy. This Court has recognized, however, that "the statutory privacy right protected by Exemption 7(C) goes beyond the common law." *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 170 (2004). Further, the common law in fact does enable corporations to protect interests similar to those at stake in Exemption 7(C). Corporations can sue for defamation to protect their reputations, and they have legal rights to control their confidential information. The government's proposed dichotomy between corporate property interests and corporate privacy interests similarly fails. In a case between two corporations, this Court recognized that "industrial espionage" implicates "[a] most fundamental human right, that of *privacy*." *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 487 (1974) (emphasis added).

C. Statutory structure confirms the correctness of the Third Circuit's interpretation of Exemption 7(C). For example, where Congress intends to refer only to natural persons—as the government claims it did here—it has used the more narrow word "individual." That Congress chose the broader word "personal," in a statute that defines "person" to include corporations, reinforces the conclusion that it did not intend to exclude corporations.

The government's attempt to seek support from two other FOIA exemptions—Exemptions 6 and 4—is unavailing. It asserts that Exemption 6—which protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(6)—applies only to individuals, and it argues that Exemption 7(C) must be similarly limited. But, as the court below explained, if Exemption 6 does not protect organizations, it is not because it contains the phrase "personal privacy." Indeed, shortly after FOIA's enactment, the Attorney General, following the same statutory analysis as the court below, recognized that the phrase "personal privacy" in Exemption 6 could be applied to a corporation. To be sure, Exemption 6 contains other language—"personnel and medical files"—that could be read to show an intent to protect only individuals. Thus, interpretations of that provision cannot be reflexively applied to Exemption 7(C).

The government also argues that Exemption 4—which exempts from disclosure "trade secrets" and "commercial or financial information" that is "privileged or confidential," 5 U.S.C. § 552(b)(4)—is all the protection a corporation needs and that Exemption 7(C) ought not, therefore, to be read to extend to corporations. The two exemptions address different interests, however. Exemption 4 prevents public disclosure of corporations' proprietary information, but it does not protect the reputational interests that Exemption 7(C) is designed to safeguard.

D. Exemption 7(C)'s purposes support the Third Circuit's interpretation. Exemption 7(C) protects suspects, witnesses, and cooperating parties in law-enforcement investigations from the reputational harm that can result from public disclosure of records submitted in such investigations. That purpose applies to corporations, which no less than individuals can face damage to their reputations resulting from involvement in a law-enforcement investigation. Reversing the Third Circuit's interpretation of Exemption 7(C) would allow competitors and strike-suit plaintiffs automatic access to private (albeit non-proprietary) information that a corporation furnishes to the government in the course of a law-enforcement investigation.

That corporations can invoke Exemption 7(C) does not mean that information regarding a given corporation's involvement in a law-enforcement investigation can never be disclosed. Exemption 7(C) is implemented through a balancing test that weighs the public interest in disclosure against the privacy interest at stake. That balancing test is flexible enough to accommodate any relevant differences between corporations and individuals with respect to privacy—such as the differences this Court has recognized in the Fourth Amendment context—and renders unnecessary the government's extra-statutory per se rule excluding corporations from Exemption 7(C).

E. Lacking support in the statutory text, the government relies heavily on the "drafting history" of Exemption 7(C). But Exemption 7(C)'s plain meaning is clear from the statutory language, making it unnecessary and inappropriate to rely on legislative history to narrow that meaning. This Court does "not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994).

Regardless, the government's legislative history establishes at most that Congress had a concern with protecting individual privacy rights in enacting Exemption 7(C). But that does not show that Exemption 7(C) *excludes* corporate privacy interests. There is no "require[ment] that every permissible application of a statute be expressly referred to in its legislative history." *Moskal v. United States*, 498 U.S. 103, 111 (1990).

F. The government's last refuge is a couple of supposed "anomalies" that it says would result from applying the statute as written. It asserts that no precedent exists for measuring institutional privacy claims. But that ignores the numerous contexts—most notably the Fourth Amendment—in which courts regularly adjudicate corporate privacy claims. Nor is there anything anomalous about applying Exemption 7(C) to foreign, state, and local governments. FOIA contains multiple protections for the federal government's privacy interests. *See, e.g.*, 5 U.S.C. § 552(b)(1), (2), (5), (7)(A), (7)(E). The government fails to explain why other sovereign entities lack interests in maintaining the confidentiality of documents they submit to our federal government to assist it in carrying out its law-enforcement function.

ARGUMENT

FOIA EXEMPTION 7(C) PROTECTS THE PRIVACY OF CORPORATE PERSONS

Exemption 7(C) protects from disclosure "records or information compiled for law enforcement purposes, . . . to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). There is no dispute that AT&T's documents that CompTel requested are "records or information" that were "compiled for law enforcement purposes." *Id.* The FCC nevertheless refused to consider AT&T's claim that disclosure here would be an unwarranted invasion of its privacy because, in the agency's view, AT&T, as a corporation, by definition has no "personal privacy" rights within the meaning of Exemption 7(C). The FCC's per se rule cannot be reconciled with the statutory text. Common legal usage, statutory structure, and Exemption 7(C)'s purposes confirm that conclusion. Exaggerated claims regarding legislative history and adverse consequences do not justify deviation from the statute's plain meaning.

A. A Corporation Is a "Person" Under FOIA and Therefore Has "Personal Privacy" Interests Protected by Exemption 7(C)

1. The Third Circuit correctly concluded that the "plain text" of Exemption 7(C) applies to corporations. App. 11a, 13a. Exemption 7(C) provides that FOIA does not apply to law-enforcement records where disclosure "could reasonably be expected to constitute an unwarranted invasion of *personal privacy*." 5 U.S.C. § 552(b)(7)(C) (emphasis added). The meaning of the phrase "personal privacy" in that provision is plain: it refers not only to the privacy of individuals but also to the privacy of corporations.

The word "personal" is an adjective meaning "[o]f or pertaining to a particular person." *Webster's* at 1828; *accord Webster's Third New International Dictionary* 1686 (2002) ("*Webster's Third*") ("of or relating to a particular person"). In this context, Congress has defined "person" to include both "individual[s]" and "corporation[s]." 5 U.S.C. § 551(2). By expressly defining the noun "person" to include corporations, Congress necessarily defined the adjective form of that noun—"personal"—also to include corporations. *See Delaware River Stevedores v. DiFidelto*, 440 F.3d 615, 623 (3d Cir. 2006) (Fisher, J., concurring) (referring to the rule that "a statute which defines a noun has thereby defined the adjectival form of that noun" as a "grammatical imperative[]"); App. 11a ("It would be very odd indeed for an adjectival form of a defined term *not* to refer back to that defined term.").[5] Thus, as used in FOIA, "personal" means "of or pertaining to a particular" "individual, partnership, corporation, association, or public or private organization." The phrase "personal privacy" therefore includes the privacy "of . . . a particular" corporation—here, AT&T.

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[5] Courts regularly define the adjective form of a noun by reference to the corresponding noun. *See John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 154 (1989) (defining term "compiled" in FOIA Exemption 7 with reference to "the word 'compile,'"

The Court need not go beyond the plain language of Exemption 7(C) to affirm the judgment. *See, e.g., Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) ("As in any case of statutory construction, our analysis begins with the language of the statute. And where the statutory language provides a clear answer, it ends there as well.") (citation and internal quotation marks omitted); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last . . . .") (citations omitted). Here, the FCC based its rejection of AT&T's reliance on Exemption 7(C) entirely on the ground that "Exemption 7(C) has no applicability to corporations." App. 32a. Because Exemption 7(C) in fact does protect the privacy of corporations in appropriate cases, the Third Circuit properly vacated

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because "compiled" is the "adjectival form" of "compile"); *Knight v. Spencer*, 447 F.3d 6, 13 n.2 (1st Cir. 2006) (looking to definition of "prototype" to determine meaning of adjective "prototypical"); *Environmental Defense Fund, Inc. v. EPA*, 82 F.3d 451, 462 n.16 (D.C. Cir.) (per curiam) (looking to the meaning of "motor vehicle" to define "vehicular"—"the adjectival form of 'motor vehicle'"), *opinion amended on other grounds*, 92 F.3d 1209 (D.C. Cir. 1996) (per curiam); *Froehly v. T. M. Harton Co.*, 139 A. 727, 729-30 (Pa. 1927) (looking to definition of "season" to define "seasonal"); *see also Littlefield v. Acadia Ins. Co.*, 392 F.3d 1, 8 & n.8 (1st Cir. 2004) (looking to definitions of "crime" in construing adverb "criminally").

the FCC's order and remanded the matter for further proceedings.

2. In seeking to limit the word "personal" to individuals, the government improperly disregards the APA's definition of "person," relying instead (at 17-18) on the layperson's understanding of that word. Because in ordinary (as opposed to legal) usage, a "person" is a "human being," *Webster's* at 1827, it is unsurprising that the dictionary definitions the government cites define "personal" with reference to an individual. In the context of Exemption 7(C), however, where the term "person" includes both "individual[s]" and "corporation[s]," 5 U.S.C. § 551(2), the adjective "personal" functions to relate the noun it modifies to a particular individual or corporation. The difference here is the statutory definition of "person," which must be given effect. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) ("When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning.").

The government does not dispute the basic principle of grammar and usage that the adjective form of a noun takes its meaning from the noun. Nor does it identify anything in FOIA, the APA, or any other source indicating that the word "personal" in Exemption 7(C) differs from its usual function and meaning as the adjective form of "person." It observes (at 42-43), however, that Congress has in certain legislation stated that a statutory definition applies to variants of the defined term. But the Court regularly follows "basic rules of grammar," *Department of Housing & Urban Dev. v. Rucker*, 535 U.S. 125, 131 (2002)—such as the principle that the adjective form of a noun draws its meaning from the noun—in interpreting statutes. It does not ignore those rules simply because they are not set forth in a particular statute. Indeed, the government's argument reduces to the claim that, whenever Congress uses variations of a defined term in a statutory text without expressly defining each specific variation, it is permissible to disregard the defined term when interpreting the variant. The government provides no authority for such a far-reaching and counterintuitive principle of statutory interpretation, and we are aware of none.

The government further argues (at 42 & n.13) that the Third Circuit relied too heavily on the linguistic relationship between "person" and "personal" because the word "personnel" also "shares the same 'root'" and "refer[s]" to "federal officials, not corporate entities." But, unlike "personal," "personnel" is not simply the adjective form of "person." Instead, as the government elsewhere has acknowledged, "the term 'personnel' normally refers to either 'a body of persons employed in some service' or 'persons of a particular (as professional or occupational) group.'" Br. for Resp. at 20, *Milner v. Department of the Navy*, No. 09-1163 (U.S. filed Oct. 15, 2010) ("Gov't *Milner* Br.") (quoting *Webster's Third* at 1687). Although AT&T made that point before, *see* Br. in Opp. 27 n.13, the government has neither acknowledged nor disputed it.

The government also suggests (at 18-19) that the term "privacy" cannot be applied to corporations. As shown below, that is incorrect; corporate privacy rights have been recognized in a number of contexts, such as the Fourth Amendment, for more than a hundred years. *See infra* Part B. More fundamentally, the government elsewhere appears to concede that, if the statutory phrase read "the privacy of any person," the APA's definition of "person" would apply, meaning the statute would protect "the privacy of any corporation." *See* Gov't Br. 15, 41-42. Such an admission fatally undermines any claim that the word "privacy" cannot be used in connection with a corporation.

Unable to show that either "personal" or "privacy" cannot refer to corporations, the government asserts (at 43-44) that "[t]he phrase 'personal privacy' must be understood as a textual unit." But the government identifies no authority supporting the notion that the phrase "personal privacy" is a term of art that necessarily applies only to individuals. The bare assertion that the words are a "textual unit" therefore adds nothing to the government's argument.

B. Recognizing the Privacy Interests of Corporate Persons Accords with Common Legal Usage

The status of corporations as "persons" with cognizable legal interests such as privacy has long been recognized in a number of contexts. The government's efforts to distinguish those contexts from this case are unpersuasive.

1. As this Court has explained, at least "by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." *Monell*, 436 U.S. at 687; *see, e.g.*, *Louisville, C. & C.R.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 558 (1844) ("[A] corporation created by and doing business in a particular state[] is to be deemed to all intents and purposes as a person, although an artificial person, . . . capable of being treated as a citizen of that state, as much as

a natural person.").[6] In that year, Congress enacted the Dictionary Act, which specified that "the word 'person'" in federal statutes presumptively includes "bodies politic and corporate." Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431, 431. At the time of the 1974 amendments to FOIA, the Dictionary Act provided (as it does today) that, "[i]n determining the meaning of any Act of Congress," the word "person" presumptively includes "corporations." 1 U.S.C. § 1; *cf. Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666 (1979) (following the Dictionary Act in construing the statutory term "white person" to include corporations).

The word "personal," no less than "person," can quite comfortably be used to refer to corporations. *See, e.g., Mercantile Bank v. Tennessee*, 161 U.S. 161, 171 (1896) (an "exemption from taxation contained in [a revenue act] was a *personal privilege* in favor of the corporation therein specifically referred to, and it did not pass with the sale of that charter") (emphasis added). Corporations have long been understood to be "persons" for the purposes of the Fifth and Fourteenth Amendments to the United States Constitution, *see, e.g., Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936) ("a corporation is a 'person' within the meaning of the equal protection and due process of law clauses"), and therefore protected by the doctrine of "personal" jurisdiction that inheres in the concept of due process, *see, e.g., Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 109-10 (1987) (plurality); 28 U.S.C. § 1391(c) ("a defendant that is a *corporation* shall be deemed to reside in any judicial district in which it is subject to *personal* jurisdiction") (emphases added). The government's unsupported assertion (at 46) that "personal jurisdiction" is not "'personal' *to a corporation* in the same sense that an individual may possess 'personal privacy'" makes no sense. The "person" in "personal jurisdiction" is the defendant, not the court. *See also Black's Law Dictionary* 930 (9th ed. 2009) (explaining that "personal jurisdiction" refers to "jurisdiction over a defendant's personal rights, rather than merely over property interests").

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[6] The government's authority (at 18) is to the same effect. *See Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 654 (1819) ("the body corporate . . . has rights which are protected by the constitution").

Consistent with those authorities, this Court has recognized that corporations are rights-bearing persons under multiple constitutional provisions. For instance, it has held that corporations can invoke rights under the First Amendment, *see Citizens United v. FEC,* 130 S. Ct. 876, 899-900 (2010) (collecting cases), the Due Process Clause, *see Minneapolis & St. Louis Ry. Co. v. Beckwith,* 129 U.S. 26, 28 (1889), and the Equal Protection Clause, *see id.*; *County of Santa Clara v. Southern Pac. R.R. Co.*, 118 U.S. 394, 396 (1886) (statement of Waite, C.J.).

Of particular relevance here, the Court has applied to corporations two constitutional provisions, the Fourth Amendment and the Double Jeopardy Clause, whose purposes are to protect privacy and to prevent embarrassment and harm to reputation—and thus are closely analogous to Exemption 7(C).

Fourth Amendment. This Court has held that corporations have privacy interests under the Fourth Amendment. *E.g., Hale v. Henkel,* 201 U.S. 43, 76 (1906). Thus, in *Dow Chemical Co. v. United States,* 476 U.S. 227 (1986), the Court explained that a corporation such as Dow "plainly has a reasonable, legitimate, and objective expectation of *privacy* within the interior of its covered buildings, and it is equally clear that expectation is one society is prepared to observe." *Id.* at 236 (emphasis added); *see also id.* at 245 (Powell, J., concurring in part and dissenting in part) ("Our precedents . . . leave no doubt that proprietors of commercial premises, including corporations, have the right to conduct their business free from unreasonable official intrusions."), 247 ("Dow has an expectation of privacy in [its] buildings . . . and . . . society is prepared to recognize that expectation as reasonable."); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977) ("Nor can it be claimed that corporations are without some Fourth Amendment rights.") (collecting cases); *Hale*, 201 U.S. at 76 ("A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body."); *United States v. Hubbard*, 650 F.2d 293, 304 (D.C. Cir. 1980) ("That the fourth amendment—which is now recognized to protect legitimate expectations of privacy—can be invoked by corporations to suppress the fruits of a search of corporate premises demonstrates an understanding that a compulsory search of even corporate premises may constitute an intrusion upon privacy.") (footnotes omitted).

The government dismisses (at 47-48) the existence of corporate privacy interests under the Fourth Amendment as irrelevant because (it asserts) those interests derive solely from the interests of the corporation's constituents. Although *Hale* originally articulated the corporation's right to privacy in those terms, the Court in *Dow Chemical* explained that "Dow"—*the corporation*, not its shareholders, directors, or officers—"has a reasonable, legitimate, and objective expectation of privacy" in its corporate property that "society is prepared to observe." 476 U.S. at 236; *see also J.J. McCaskill Co. v. United States*, 216 U.S. 504, 514 (1910) ("Undoubtedly a corporation is, in law, a person or entity entirely distinct from its stockholders and officers."). Further, in *G.M. Leasing*, the Court identified the proposition that "business premises are . . . protected by the Fourth Amendment" separately from the proposition that "*corporations*" have "Fourth Amendment rights." 429 U.S. at 353 (emphasis added). The Court thus made clear that the Fourth Amendment protects not only "business premises" (Gov't Br. 47), but also the corporate "petitioner's privacy" (*G.M. Leasing*, 429 U.S. at 354).

More fundamentally, the government never explains why, if the privacy "rights of those who collectively own and operate corporations" (Gov't Br. 47) are entitled to protection under the Fourth Amendment, such a collective right to privacy is irrelevant to the interpretation of FOIA. Congress enacted Exemption 7(C) against the background principle that a corporation retains a reasonable expectation of privacy under the Fourth Amendment "[i]n organizing itself as a collective body." *Hale*, 201 U.S. at 76. The government therefore bears a heavy burden to demonstrate that the decision to organize in the corporate form waives all privacy interests under FOIA.

That individuals may be entitled to greater protection under the Fourth Amendment than corporations, as the government asserts (at 48), likewise does not distinguish corporate privacy under the Fourth Amendment from corporate privacy under FOIA. AT&T has acknowledged that, in the balancing that takes place under FOIA, corporate privacy interests may not be entitled to the same treatment as individual privacy interests in all cases. *See* Br. in Op. 19; AT&T C.A. Br. 34. But that does not mean that corporate privacy rights are nonexistent.

Double Jeopardy Clause. The Court has applied the Fifth Amendment's Double Jeopardy Clause in cases involving the prosecution of a corporation. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 565 & n.1, 574-75 (1977); *Fong Foo v. United States,* 369 U.S. 141, 143 (1962) (per curiam). That provision's principal rationale is to protect "the deeply ingrained principle" that a defendant should not be subjected "to embarrassment, expense and ordeal" and "a continuing state of anxiety and insecurity" resulting from multiple prosecutions. *Yeager v. United States*, 129 S. Ct. 2360, 2365-66 (2009) (internal quotation marks omitted); *accord Martin Linen*, 430 U.S. at 569.

The government does not address *Fong Foo*, but argues (at 49) that the question whether the corporate defendants in *Martin Linen* could assert the Double Jeopardy Clause was not "squarely addressed" in that case. But, as the government admits, it argued there that the Double Jeopardy Clause does not protect corporations, *see* Br. for U.S. at 13 n.6, *Martin Linen, supra* (No. 76-120), 1976 WL 181441, yet the Court held that the government's appeal was barred, nowhere suggesting that it had left open the predicate question whether the corporate defendant could invoke the protections of the Double Jeopardy Clause. *Cf. Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 575 (1949) (opinion of Jackson, J.) (observing that it would be "quite improper" to "discuss and dispose of [a] corporation's contentions on their merits . . . if the corporation had no standing to raise the constitutional questions"). The courts of appeals that have addressed the issue have read this Court's cases as establishing that the Double Jeopardy Clause protects corporations, and commentators have agreed. *See United States v. Hospital Monteflores, Inc.*, 575 F.2d 332, 333-34 (1st Cir. 1978); *United States v. Security Nat'l Bank*, 546 F.2d 492, 493 (2d Cir. 1976); *United States v. Southern Ry. Co.*, 485 F.2d 309, 312 (4th Cir. 1973); 4 Wayne R. LaFave et al., *Criminal Procedure* § 15.1(b), at 383-84 & n.21 (3d ed. 2007) ("*Criminal Procedure*") ("the Court has . . . applied the double jeopardy prohibition to an entity") (citing *Martin Linen*); Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 Harv. L. Rev. 1745, 1754 (2001) (*Martin Linen* "included corporations within the Fifth Amendment's protection against double jeopardy").

The government is incorrect in suggesting (at 49) that the Double Jeopardy Clause primarily protects the integrity of judgments, rather than the interests of defendants. The Double Jeopardy Clause is not "simply res judicata dressed in prison grey." 6 *Criminal Procedure* § 25.1(b), at 574 (internal quotation marks omitted). Rather, "[f]inality" for purposes of the Clause "looks . . . more to protecting the defendant against prosecution oppression." *Id.* Thus, the "general design of the Double Jeopardy Clause" is that the defendant should not be subjected "to embarrassment, expense and ordeal" through multiple prosecutions. *United States v. DiFrancesco*, 449 U.S. 117, 127-28 (1980) (internal quotation marks omitted).

Nor is the government right when it claims (at 49-50) that the Double Jeopardy Clause's purpose of protecting defendants from "embarrassment" (*Martin Linen*, 430 U.S. at 569) cannot apply to a corporation. Although corporations qua corporations "do not have human emotions," they still can suffer "harm to . . . legitimate, protectible interest[s]," *Hospital Monteflores*, 575 F.2d at 335, such as harm to reputation. Public criminal prosecutions can damage a corporation's "good will," and "bad publicity" can "affect the corporation's ability to do business with the public or to raise capital on public markets." *Id.*; *see Security Nat'l Bank*, 546 F.2d at 494 ("No corporation, large or small, can escape the 'incalculable effect' which a conviction may have on the public attitude toward the company."); 4 *Criminal Procedure* § 15.1(b), at 384 ("the entity surely is capable of suffering . . . burdens associated with being the subject of a prosecution—e.g., financial costs, *injury to reputation*, and disruption of the ordinary pattern of activities") (emphasis added).

2. Against the weight of that authority, the government offers two unfounded and inapt analogies of its own.

Tort law. The government relies heavily (at 19) on the notion that a corporation cannot sue in tort for invasion of privacy. *But cf. Socialist Workers Party v. Attorney General*, 463 F. Supp. 515, 525 (S.D.N.Y. 1978) (recognizing association's claim for invasion of privacy). This Court, however, has specifically distinguished "the question whether a tort action might lie for invasion of privacy" from "[t]he question of the statutory meaning of privacy under the FOIA." *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762 n.13 (1989). "[T]he statutory privacy right protected by Exemption 7(C) *goes beyond* the common law and the

Constitution." *Favish*, 541 U.S. at 170 (emphasis added).

Further, the proposition that corporations have no privacy interests recognized under the common law is demonstrably incorrect. Corporations have protectable interests in, for example, their names, reputations, and confidential information. *See* Restatement (Second) of Torts § 561 (1977) (corporation may sue for defamation); *id.* § 652I cmt. c (corporation has "a limited right to the exclusive use of its own name or identity"); William L. Prosser, *Handbook of the Law of Torts* § 117, at 815 (4th ed. 1971) (same); *Carpenter v. United States*, 484 U.S. 19, 26 (1987) ("Confidential information acquired or compiled by a corporation in the course and conduct of its business is a species of property to which the corporation has the exclusive right and benefit, and which a court of equity will protect through the injunctive process or other appropriate remedy.") (internal quotation marks omitted); *see also H & M Assocs. v. City of El Centro*, 167 Cal. Rptr. 392, 399-400 (Cal. Ct. App. 1980) ("In the commercial world, businesses, regardless of their legal form, have zones of privacy which may not be legitimately invaded."); *Dayton Newspapers, Inc. v. City of Dayton*, 259 N.E.2d 522, 534 (Ohio Ct. Com. Pl. 1970) ("The right of privacy applies to individuals, corporations, associations, institutions and to public officials."), *aff'd*, 274 N.E.2d 766 (Ohio Ct. App. 1971); Anita L. Allen, *Rethinking the Rule Against Corporate Privacy Rights: Some Conceptual Quandries for the Common Law*, 20 J. Marshall L. Rev. 607, 626-27 (1987) ("[U]nder many areas of state and federal law, corporations and other business entities are afforded privacy protection against unwanted access to information, property and personnel. Outside of privacy tort law, it is not widely thought that there is a purely conceptual bar either to ascribing privacy protection rights to corporations or to calling them 'privacy' rights.") (footnote omitted).

The government also fails in its effort (at 19-20) to distinguish, as a categorical matter, "privacy" interests—which the government claims corporations lack—from the "property" interests that it acknowledges corporations possess. Courts have referred to corporations' interests in their confidential information as privacy interests. This Court, for one, explained in a case between two corporations that "there is [an] inevitable cost to the basic decency of society when one firm steals from another. A most fundamental human right, that of *privacy*, is threatened when industrial espionage is condoned or is made profitable." *Kewanee Oil*, 416 U.S. at 487 (emphasis added); *see E. I. duPont deNemours & Co. v. Christopher*, 431 F.2d 1012, 1016 (5th Cir. 1970) ("Commercial privacy must be protected from espionage which could not have been reasonably anticipated or prevented.").[7]

Self-Incrimination Clause. The government incorrectly suggests (at 49-50) that a corporation's documents receive less protection than an individual's documents under the Fifth Amendment's privilege against self-incrimination. In fact, the privilege simply does not apply to documents, regardless of who possesses them.

Originally, the privilege was held to protect the content of an individual's, but not a corporation's, documents. *See United States v. White*, 322 U.S. 694 (1944); *Boyd v. United States*, 116 U.S. 616 (1886). That differential treatment was based on pragmatic considerations: "effective enforcement of many federal and state laws would be impossible" if corporations could refuse any government subpoena for the production of documents. *White*, 322 U.S. at 700. The Court also indicated that a corporation could not effectively assert the privilege, because it can act only through its agents, and an agent cannot assert the privilege to avoid incriminating a principal. *See id.* at 699-700 (because "the papers and effects which the privilege protects must be the private property of the person claiming the privilege," and "the official records and documents of the organization . . . are not the private records of the individual" representative, those papers "embody no element of personal privacy" with respect to the representative).[8]

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[7] Even the government's authority (at 18) described "the law of trade secrets" as an aspect of "the right to privacy." Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 212-13 (1890).

After *Fisher v. United States*, 425 U.S. 391 (1976), the privilege does not entitle any person to refuse to produce documents on the ground that they contain incriminating information. That is because the privilege does not protect "privacy"; it protects "against compelled self-incrimination." *Id.* at 401 (internal quotation marks omitted). Thus, today, it is a "settled proposition" that an individual "may be required to produce specific documents even though they contain incriminating assertions of fact or belief because the creation of those documents was not 'compelled' within the meaning of the privilege." *United States*

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[8] *White* therefore did not hold, as the government suggests (at 50), that a corporation has no personal privacy interests in its own documents; instead, it held that production of corporate documents by a corporate representative does not invade *the representative's own* personal privacy. *See* 322 U.S. at 699-700.

v. Hubbell, 530 U.S. 27, 35-36 (2000). *Fisher* replaced the prior rule with the "act of production" doctrine, which holds that the act of producing documents and testifying regarding that production "may have a compelled testimonial aspect" that implicates the privilege against self-incrimination. *Id.* at 36. Although the Court has held that corporations, unlike individuals, cannot rely on the act of production doctrine, it has based that result largely on the pre-*Fisher* precedent and reasoning. *See Braswell v. United States*, 487 U.S. 99, 105-13, 115-16 (1988).

Because the privilege against self-incrimination is not a privacy right, the inability of a corporation to assert that privilege does not remotely suggest that a corporation lacks privacy interests in its documents. On the contrary, corporations do in fact possess a reasonable expectation of privacy regarding their documents, and government subpoenas for corporate documents therefore must be "reasonable" under the Fourth Amendment. *See Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984); *Hale*, 201 U.S. at 76; *see also Fisher*, 425 U.S. at 400-01; *CAB v. United Airlines, Inc.*, 542 F.2d 394, 399 (7th Cir. 1976) ("while the expectation of privacy of a regulated carrier is limited, . . . there are internal corporate papers that stand at the heart of management effort, and . . . there is a strong element of privacy in such items") (internal quotation marks omitted).

Here, of course, AT&T complied with the FCC's letter of inquiry compelling the production of documents. It did not attempt to resist the FCC's demand through assertion of the privilege against self-incrimination. Thus, the question in this case is whether FOIA *automatically* entitles AT&T's

competitors (and other requestors who might benefit from damaging AT&T's reputation) to obtain the documents AT&T provided to the FCC. On that question, this Court's decisions recognizing corporate privacy interests under the Fourth Amendment and the Double Jeopardy Clause refute the government's position that a corporation can never have personal privacy interests protected under Exemption 7(C).

C. The Structure of FOIA and Related Statutes Confirms That Exemption 7(C) Applies to Corporations

Consideration of the structure of FOIA and the closely related Privacy Act of 1974 confirms that Congress's reference to "personal" in Exemption 7(C) extends to corporations and cannot be limited to natural persons.

1. Had Congress intended to preclude corporations from invoking Exemption 7(C), it could have used the term "individual." Thus, unlike Exemption 7(C), FOIA Exemption 7(F) specifies that it protects only an "individual." 5 U.S.C. § 552(b)(7)(F). Similarly, in the Privacy Act, Congress chose to protect only "individual[s]," 5 U.S.C. § 552a(a)(2), thereby excluding "corporations or sole proprietorships," *St. Michael's Convalescent Hosp. v. California*, 643 F.2d 1369, 1373 (9th Cir. 1981). That Congress expressly incorporated some FOIA definitions into the Privacy Act, *see* 5 U.S.C. § 552a(a)(1) (defining "agency" as that term is defined in FOIA, *id.* § 552(e)), reinforces the significance of Congress's decision to define "individual" separately under § 552a(a)(2). Indeed, Congress used both "person" and "individual" in the Privacy Act, further demonstrating that Congress understood the distinction between the two. *See, e.g.*, *id.* § 552a(b) ("[n]o agency shall disclose any record

. . . to any *person*, or to another agency, except pursuant to a written request by, or with the prior written consent of, the *individual* to whom the record pertains") (emphases added). What is more, the phrase "individual privacy" appears in multiple provisions throughout the United States Code. *See* 6 U.S.C. § 485(b)(1)(H); 16 U.S.C. § 410jj-1(2); 20 U.S.C. § 9871(e)(2)(C)(ii)(II); 42 U.S.C. § 2473c(f)(1); 49 U.S.C. §§ 5331(d)(1), 20140(c)(1), 31306(c)(1), 45104(1). Thus, in 6 U.S.C. § 485, Congress directed the President to "incorporate[] protections" only for "individuals' privacy" in facilitating the sharing of terrorism information. *Id.* § 485(b)(1)(H).

Unlike those provisions, Exemption 7(C) does not use the term "individual" or include any other textual indication of an intent to exclude corporations. The decision not to use language that would refer exclusively to natural persons must be presumed to be intentional. *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted, alterations in original); App. 12a (Exemption 7(F)'s language shows that "Congress knew how to refer solely to human beings (to the exclusion of corporations and other legal entities) when it wanted to").

The government's reliance (at 33) on the appearance of the phrase "personal privacy" in the Privacy Act's uncodified statement of purpose, *see* Pub. L. No. 93-579, § 2(b), 88 Stat. 1896, 1896 (reprinted at 5 U.S.C. § 552a note), misses a fundamental point: there is no dispute that the phrase "personal privacy" includes the privacy of individuals. The only question is whether it necessarily excludes the privacy of corporations. Notably, the same section of the Privacy Act uses the phrases "the privacy of an individual," "individual privacy," and "the privacy of individuals," *id.* § 2(a)(1), (2), (5), further demonstrating that Congress knows how to restrict the application of personal privacy protections to individuals when that is its intention. Considered in context, the language the government cites reinforces the point. It states that the Privacy Act's purpose "is to provide certain safeguards *for an individual* against an invasion of personal privacy." *Id.* § 2(b) (emphasis added). The emphasized language shows that Congress there intended to address only the personal privacy of individuals; it does not suggest that corporations cannot also have personal privacy protected in other statutory contexts.

2. In seeking to limit Exemption 7(C) to individuals, the government relies to no avail on two other FOIA exemptions—Exemptions 6 and 4.

Exemption 6. The government incorrectly argues (at 20-24) that the phrase "personal privacy" in Exemption 7(C) must refer only to natural persons because the same phrase appears in Exemption 6 and (according to the government) Exemption 6 protects only individuals. Nothing about the phrase "personal privacy" in Exemption 6 excludes corporations.

In fact, shortly after FOIA's enactment in 1966, the Attorney General, following the same textual analysis as the Third Circuit here, interpreted the phrase "personal privacy" in Exemption 6 to *include* corporations. U.S. Dep't of Justice, *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 36-37 (June 1967)

("*1967 AG Memorandum*"). The *1967 AG Memorandum* first addressed the phrase "personal privacy" in connection with FOIA's clause permitting agencies to redact identifying details from published documents "[t]o the extent required to prevent a clearly unwarranted invasion of personal privacy." Pub. L. No. 89-487, § 1, 80 Stat. 250, 250 (codified as amended at 5 U.S.C. § 552(a)(2)). Interpreting that provision, the Attorney General noted that "the applicable definition of 'person,' which is found in section 2(b) of the Administrative Procedure Act, includes corporations and other organizations as well as individuals." *1967 AG Memorandum* at 19. Observing that the legislative history of the clause "shows that [it] is intended to protect privacy in a person's business affairs as well as in medical or family matters," the Attorney General concluded that, "[i]n the context of this section, the reasons for deleting identifying details would seem as applicable to corporations as to individuals." *Id.*

Turning to Exemption 6, the Attorney General explained that it likewise applies to both individuals and corporations:

> It is apparent that [Exemption 6] is intended to exclude from the disclosure requirements all personnel and medical files, and all private or personal information contained in other files which, if disclosed to the public, would amount to a clearly unwarranted invasion of the privacy of any person, including members of the family of the person to whom the information pertains. As was explained . . . above, the applicable definition of "person," which is found in section 2(b) of the Administrative Procedure Act, would include

> corporations and other organizations as well as individuals.

Id. at 36-37. Although the Attorney General cautioned that "[t]he kinds of files referred to in" Exemption 6 "would *normally* involve the privacy of individuals rather than of business organizations," *id.* at 37 (emphasis added), that did not change his conclusion that the phrase "personal privacy" could apply to corporations.

Consistent with the *1967 AG Memorandum*, the D.C. Circuit has applied the "personal privacy" protections in Exemption 6 to corporate information. In *Judicial Watch, Inc. v. FDA*, 449 F.3d 141 (D.C. Cir. 2006), the Food and Drug Administration ("FDA"), citing Exemption 6, had withheld information relating to "private individuals and companies who worked on the approval" of a controversial drug. *Id.* at 153. The court further explained that the privacy interests at stake under FOIA "vary depending on . . . context" and that, in that case, disclosure of information about "persons and businesses associated with [the drug]" risked "harassment" of those individuals and entities and therefore implicated the privacy interests of Exemption 6. *Id.* (internal quotation marks omitted). The government speculates (at 39-40) that the only reason the *Judicial Watch* court applied Exemption 6 was to protect the safety of employees that worked at those companies. But the decision itself does not support that reading. The companies themselves had intervened in the case, *see id.* at 145, and the court clearly held that FOIA protected not only the "private individuals" but also the "companies" that worked on approval of the drug, as well as "all business partners associated with the manufacturing of the drug," *id.* at 152.

The government argues (at 22-24) that the 1974 Congress that enacted Exemption 7(C) would have believed that Exemption 6 protected only individuals. But that ignores the prevailing interpretation of Exemption 6 by the Attorney General, which provided that the exemption's plain text applies to corporations. Indeed, in *Favish*, on which the government relies (at 24), the Court specifically identified the *1967 AG Memorandum* as part of the background against which Congress legislated in amending FOIA in 1974. *See* 541 U.S. at 169. The government collects (at 20-24) snippets from cases and congressional committee reports establishing that the phrase "personal privacy" in Exemption 6 encompasses an individual's privacy rights.[9] But no one disputes that conclusion. The question is whether that language also encompasses corporations, particularly when the statute expressly defines "person" to do so. Unlike the *1967 AG Memorandum*, the cases and legislative history on which the government relies do not address that question.

The government cites (at 23) a hornbook that disagreed with the Attorney General's interpretation of Exemption 6, as well as a student note citing the hornbook with approval. *See* Kenneth Culp Davis, *Administrative Law Treatise* § 3A.22, at 164 (1970 Supp.) ("Davis") ("I think 'personal privacy' always relates to individuals."); Gregory L. Waples, Note, *The Freedom of Information Act: A Seven-Year Assessment*, 74 Colum. L. Rev. 895, 954 n.323 (1974). Professor Davis provides no reasoning or authority to support his bare assertion, and there is no reason to conclude that legislators would have ignored the Attorney General's straightforward reading of the statute's plain language in favor of one law professor's *ipse dixit*. Moreover, even Professor Davis recognized the propriety of protecting corporate privacy. Writing about FOIA's clause (now codified at § 552(a)(2)) that empowers agencies to delete identifying details from published documents to protect "personal privacy," Professor Davis opined that an agency "[c]learly" should be able to delete such details to protect corporate privacy—even though he thought that "one *probably* cannot say that a corporation has a 'personal privacy'"—because "[t]he ineptitude of the draftsmen should not prevent a sensible result." Davis § 3A.13, at 139 (emphasis added); *see also id.* at 139 n.51 (dismissing the congressional committees' "failure to think of corporations" in drafting their reports as "probably an inadvertence").

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[9] None of the cases the government cites (at 23-24) implicated corporate privacy. *See Wine Hobby USA, Inc. v. IRS*, 502 F.2d 133 (3d Cir. 1974) (names and addresses of individuals registered to produce wine for family use); *Rural Hous. Alliance v. USDA*, 498 F.2d 73 (D.C. Cir.) (information about individuals subject to housing discrimination), *opinion supplemented on other grounds*, 511 F.2d 1347 (D.C. Cir. 1974); *Rose v. Department of the Air Force*, 495 F.2d 261 (2d Cir. 1974) (summaries of investigations of honor-code violations by Air Force Academy cadets), *aff'd*, 425 U.S. 352 (1976); *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971) (names and home addresses of employees eligible to vote in union elections).

Because the phrase "personal privacy" can refer to both individual and corporate privacy, if Exemption 6 does not protect corporations, it is because the exemption applies only to "personnel and medical files and similar files." 5 U.S.C. § 552(b)(6). Whereas the disclosure of information in such files is highly likely to implicate the privacy of individuals, the same cannot be said for the privacy of corporations. *See* App. 13a; *1967 AG Memorandum* at 36-37. But that does not mean that the phrase "personal privacy" has different meanings in the two exemptions. Instead, it reflects that Exemption 6 contains *other* language ("personnel and medical files") limiting its application to individuals.

In criticizing the Third Circuit's reasoning on that point, the government asserts (at 45-46) that the disclosure of information in a corporation's personnel or medical files could invade the corporation's privacy by revealing information about its "internal affairs." But the "files" referred to in Exemption 6 are "Government files," *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 602 n.4 (1982), not a corporation's files. *See* Gov't Br. 42 n.13 ("Congress clearly used the term 'personnel' in Exemption 6 to refer to *files for federal officials*") (emphasis added); *see also Department of the Air Force v. Rose*, 425 U.S. 352, 375 n.14 (1976) ("the primary concern of Congress in drafting Exemption 6" was to protect information "in such files as those maintained by the Department of Health, Education, and Welfare, the Selective Service, and the Veterans' Administration"). Although it is somewhat difficult to imagine a case in which information in an agency's own personnel files would implicate a corporation's privacy interests, the key point is that the words "personnel" and "medical" in Exemption 6 cannot be disregarded. If Exemption 6 applies only to individuals (an issue not presented here), it is because those terms show that Congress intended the exemption to protect information "about a particular individual." *Washington Post*, 456 U.S. at 600; *see id.* (referring to "'personnel and medical files'" as "the two benchmarks for measuring the term 'similar files'").

The government's effort to equate Exemptions 6 and 7(C), despite their distinct language, is not advanced by its assertion (at 22) that "Congress incorporated the phrase 'personal privacy' into Exemption 7(C) directly from Exemption 6 in 1974." The government bases that claim entirely on a single legislator's floor statement. Assuming for the sake of argument that resort to legislative history were appropriate to interpret the plain language of Exemption 7(C), the Court has declined to rely on floor statements to determine congressional intent. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 457 & n.15 (2002); *Garcia v. United States*, 469 U.S. 70, 76 (1984); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980).

Moreover, Senator Hart's statement does not establish the proposition for which the government cites it. He said only that "the protections in the sixth exemption for personal privacy also apply to disclosure under the seventh exemption." 120 Cong. Rec. 17,033 (1974). That Exemption 7(C)'s protection for personal privacy includes the privacy interests that Exemption 6 protects does not prove that Exemption 7 does not also protect other interests. In fact, Senator Hart stated that he "wish[ed] also to make clear, in case there is any doubt, that [Exemption 7(C)'s protection for personal privacy] is intended to protect *the privacy of any person* mentioned in the requested files." *Id.* at 17,033-34 (emphasis added). Thus, contrary to the government's position here, Senator Hart equated the phrases "personal privacy" and "the privacy of any person," *see id.*, and he must be presumed to have understood that the term "person" in FOIA includes corporations.

Exemption 4. The government also argues (at 24-27) that Exemption 4 protects any "legitimate interest" corporations have "in preserving the confidentiality" of their information. But Exemption 4's limited protection for trade secrets and confidential commercial information does not address the reputational interests that Exemption 7(C) protects.

Exemption 4 applies to "trade secrets" as well as "commercial or financial information . . . [that is] privileged or confidential." 5 U.S.C. § 552(b)(4). The exemption's protection for "confidential" commercial information does not protect against "reputational injury" or "embarrassment in the marketplace"—such as a "competitor['s]" use of documents "to discredit [the disclosing corporation] in the eyes of current and potential customers." *United Techs. Corp. v. United States Dep't of Defense*, 601 F.3d 557, 563-64 (D.C. Cir. 2010) (collecting cases).[10] Although Exemption 4 is said to apply where release of the information is "likely to cause . . . substantial competitive harm," that standard is met only when disclosure would enable "the affirmative use of proprietary information by competitors." *Id.* at 563 (internal quotation marks omitted); *see also Utah v. United States Dep't of the Interior*, 256 F.3d 967, 969 (10th Cir. 2001) (following D.C. Circuit's interpretation of Exemption 4); *Frazee v. United States Forest Serv.*,

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[10] In addition, Exemption 4 has been construed to provide significantly less protection for "trade secrets" than the common law. *See Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1286-89 (D.C. Cir. 1983) (rejecting "'widely relied-upon definition'" of trade secret from the Restatement of Torts (1939)) (quoting *Kewanee Oil*, 416 U.S. at 474).

97 F.3d 367, 370-71 (9th Cir. 1996) (same); *Nadler v. FDIC*, 92 F.3d 93, 95 (2d Cir. 1996) (same).[11]

This case illustrates the point. The FCC below proposed to redact information that it believed met the dictates of Exemption 4. App. 40a-42a. Yet the documents that remain unredacted—and that the FCC ordered disclosed to CompTel—nevertheless contain confidential internal information about AT&T's alleged wrongdoing that, even if not proprietary within the meaning of Exemption 4, could nevertheless be used in an effort to damage AT&T's reputation. *See supra* p. 2 (observing that the documents at issue contain, for example, information about how AT&T's subsidiary came to bill the invoices in question, descriptions of discussions between AT&T and its customers, and AT&T's own views on whether its actions were in compliance with its own Code of Conduct).

The government asserts (at 26) that, "[h]ad Congress intended its enactment of Exemption 7(C) in 1974 to enhance FOIA's protections for the confidentiality interests of corporations and other entities, it presumably would have employed language similar to that used in Exemption 4—such as 'trade secrets' or 'confidential' 'commercial or financial information.'" But the government's proposed rewriting of Exemption 7(C) would simply have rendered it duplicative of Exemption 4. Congress instead achieved a different purpose in Exemption 7(C), enacting a limited safeguard for personal privacy that protects the reputations of persons involved in law-enforcement investigations. Nothing in Exemption 4 serves that purpose, as the authorities quoted above demonstrate.

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[11] Although the term "confidential" in Exemption 4 has been construed in at least one circuit to apply where a corporation voluntarily provides to the government documents containing commercial or financial information "of a kind that the provider would not customarily release to the public," *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 880 (D.C. Cir. 1992) (en banc), that more lenient standard has been held not to apply in cases such as this one, where the agency requires the corporation to provide the documents in question. App. 40a-41a. That is so even though the investigation in this case arose from AT&T's own voluntary disclosure.

3. For its part, CompTel seeks to create ambiguity in Exemption 7(C) by pointing out (at 18-19) that defining "personal" to include corporations would appear unusual in other statutory provisions that refer to "personal property" or "personal injury." But those are terms of art in the law, *see Black's Law Dictionary* at 1337 (defining "personal property"); *id.* at 857 (defining "personal injury"), in which the word "personal" does not carry its ordinary meaning as the adjective form of "person." Thus, "personal property" does not mean "property of a person"; it means property "not classified as real property." *Id.* at 1337. Similarly, "personal injury" generally refers to "bodily injury" or "mental suffering." *Id.* at 857. Neither CompTel nor the government provides any textual evidence that the words "personal privacy" likewise are a term of art and that the word "personal" in Exemption 7(C) therefore should not be given its ordinary meaning as the adjective form of the defined noun "person."

D. Recognizing Corporate Privacy Interests Comports with Exemption 7(C)'s Purposes

1. An interpretation of Exemption 7(C) that allows for the possibility of corporate privacy rights accords not only with the text of the exemption, but also with its purposes. Exemption 7(C) "affords

broad[] privacy rights to suspects, witnesses, and investigators" in law-enforcement investigations. *Bast v. United States Dep't of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981). The exemption reflects Congress's judgment that disclosure of information about those parties "may result in embarrassment or harassment," *Davin v. United States Dep't of Justice*, 60 F.3d 1043, 1058 (3d Cir. 1995), and "potentially more serious reputational harm," *Senate of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987) (R.B. Ginsburg, J.).

That purpose plainly applies to corporations. Corporations, like individuals, are routinely suspects or cooperating parties (or both) in law-enforcement investigations. And corporations, like individuals, face the prospect of significant reputational harm based upon their involvement in such investigations.[12] No less than individuals, an organization that serves as a "witness[]" or "informant[]" in a law-enforcement investigation also has a substantial interest in preventing the disclosure of records that could risk retaliation by, for example, customers and suppliers. *Cf. Senate of Puerto Rico*, 823 F.2d at 588.

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[12] *See* Cindy R. Alexander, *On the Nature of the Reputational Penalty for Corporate Crime: Evidence*, 42 J.L. & Econ. 489, 492 (1999) (citing study showing that "publicly traded corporations sustained substantial losses in goodwill when named as targets of [Federal Trade Commission] investigations for having possibly violated its regulations against false and misleading advertising"); Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. Legal Stud. 319, 332 (1996) ("[c]orporations convicted of crimes may well suffer significant reputational losses"); Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 Geo. L.J. 1743, 1771-72 (2005) ("Investigations and convictions of corporations, like those of individuals, often trigger significant extralegal sanctions for the defendants and their employees. These sanctions include loss of morale, damage to reputation and corporate image, damage to relationships with customers, suppliers, and the government, bars to future business, and (as a consequence of all of this) significant drops in share price and market share. The size of these extralegal penalties often dwarfs that of the formal legal penalties.") (footnotes omitted).

The government's construction of Exemption 7(C) thus categorically excludes an important set of actors that can be swept into law-enforcement investigations and then later made to suffer serious consequences. Adopting its interpretation would mean that, anytime a corporation voluntarily discloses possible unlawful conduct, any information provided to regulators as part of a resulting investigation *must be disclosed* not only to the media and public-interest organizations, but also to the corporation's competitors and legal adversaries. Such a result cannot be squared with the exemption's purpose.

Beyond that, a cramped view of the scope of Exemption 7(C) could chill voluntary cooperation by corporations and other organizations in law-enforcement investigations. Exemption 7 as a whole guards against the "potential disruption in the flow of information to law enforcement agencies" caused by a fear "of the prospect of disclosure." *FBI v. Abramson*, 456 U.S. 615, 630 (1982). As the facts of this case bear out, corporations routinely cooperate in law-enforcement investigations, often initiating such investigations themselves upon discovery of potential wrongdoing. A rule foreclosing the possibility of invoking Exemption 7(C) could make corporations less willing to do so, out of concern that potentially damaging confidential information could, as the FCC held here, be made public based on nothing more than a one-sentence FOIA request from a group of competitors. *See* App. 14a n.5 ("Reading 'personal privacy' to exclude corporations would disserve Exemption 7(C)'s purpose of encouraging corporations—like human beings—to cooperate and be forthcoming in such investigations.").

2. CompTel—but not the government—argues (at 33-34) that the Third Circuit's decision is inconsistent with FOIA's policy of disclosure. But that argument rests on an incomplete account of Congress's purposes in enacting FOIA. In the Act, Congress struck a "balance" by including statutory exemptions from disclosure that "this Court has recognized . . . are intended to have meaningful reach and application." *John Doe Agency*, 493 U.S. at 152-53 (internal quotation marks omitted). "Congress realized that legitimate governmental and private interests could be harmed by release of certain types of information, and therefore provided the specific exemptions under which disclosure could be refused." *Id.* at 152 (internal quotation marks omitted); *see Abramson*, 456 U.S. at 630-31 ("While Congress established that the basic policy of the Act is in favor of disclosure, it recognized the important interests served by the exemptions."); *cf. Favish*, 541 U.S. at 165 ("[T]he concept of personal privacy under Exemption 7(C) is not some limited or cramped notion of that idea.") (internal quotation marks omitted). Thus, any discussion of congressional purpose cannot ignore the objectives of FOIA's exemptions, which plainly support the result here. The government has made the same point in a brief filed this Term. *See* U.S. *Milner* Br. 49.

CompTel also suggests (at 34-35) that allowing corporations to "claim" privacy interests under Exemption 7(C) would result in the "public" being "denied" important information about how the government fulfills its law-enforcement responsibilities. CompTel is mistaken. As an initial matter, the consequence of applying Exemption 7(C)—or any other FOIA exemption—is that the government is not required to disclose the requested information. That is so whether the party asserting the exemption is an entity or an individual. More fundamentally, identifying the privacy interest at stake is only the first step in applying Exemption 7(C). The next step, which the Third Circuit here left to the FCC to perform, is to "balance" that "privacy interest" against "the public interest in disclosure," *Favish*, 541 U.S. at 171, to determine whether the invasion of privacy would be "unwarranted," 5 U.S.C. § 552(b)(7)(C); 47 C.F.R. § 0.457(g)(3).

In a case where there is a legitimate public interest in the requested information, and a corporation's privacy interests are insubstantial, then that balance would be struck in favor of disclosure. If the government and CompTel had their way, however, potentially damaging corporate documents collected for law-enforcement purposes would be subject to automatic disclosure without any need even to articulate why the requested information is likely to advance the public interest. *See Favish*, 541 U.S. at 172. Moreover, that corporations are not categorically excluded from claiming the protections of Exemption 7(C) does not mean that they must be treated the same as individuals. AT&T has acknowledged that point in both this Court and the court of appeals, *see supra* p. 23, and nothing in the Third Circuit's decision mandates that the privacy interests of corporations be given the same weight as the privacy interests of individuals in applying Exemption 7(C).

Thus, CompTel is wrong to suggest (at 26-27) that the Third Circuit's decision resurrects the law that existed before the 1974 amendments, under which the public was denied access to "meat inspection reports" and the like compiled for law-enforcement purposes. Under the prior law, such documents were automatically withheld. *See Abramson*, 456 U.S. at 627 n.11 (describing congressional concern with "stone wall" erected by decisions interpreting pre-1974 Exemption 7 to "prevent[] public access to any material in an investigatory file") (internal quotation marks omitted). But the Third Circuit's decision does not prevent disclosure of all corporate documents collected for law-enforcement purposes. Instead, as with individuals, when a corporate participant in a law-enforcement investigation asserts a privacy interest in requested information, a balancing analysis is performed to determine whether disclosure is warranted.

E. The Government's Reliance on Legislative History and Statements from Lower Courts Is Misplaced

1. The Third Circuit correctly determined that, because Exemption 7(C)'s plain language shows that it applies to corporations, resort to legislative history is inappropriate in this case. App. 13a-14a; *see, e.g.*, *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material."); *Lamie v. United States Trustee*, 540 U.S. 526, 534, 536 (2004) (fact that statute "is awkward, and even ungrammatical," does not make reliance on legislative history appropriate where "plain meaning" can be determined); *Rucker*, 535 U.S. at 132-33; *Hughes*

Aircraft, 525 U.S. at 438; *Ratzlaf*, 510 U.S. at 147-48 & n.18; *Connecticut Nat'l Bank*, 503 U.S. at 253-54; *see also Exxon Mobil*, 545 U.S. at 568 (describing problems with reliance on legislative history).

Moreover, the legislative history on which the government relies does not even address the question presented. The government's seven-page discussion of Exemption 7(C)'s "drafting history" contains only one snippet (at 29) that purports to relate to whether Exemption 7(C) encompasses corporations as well as individuals—a floor statement in which Senator Dole introduced into the record a district court case that, according to the government, said that Exemption 6 cannot be claimed by a corporation. Even assuming that a floor statement, rather than the statutory text, is the appropriate source for ascertaining congressional intent, *but see Barnhart*, 534 U.S. at 457 ("Floor statements . . . cannot amend the clear and unambiguous language of a statute."), Senator Dole's statement had nothing to do with Exemption 7(C). He referenced the case to support a proposed amendment to *Exemption 4*, which would have specified that Exemption 4 protects applications for research grants. *See* 120 Cong. Rec. at 17,045 (stating that the case "clearly demonstrates the need for congressional action to insure that research ideas are indeed accorded the confidential status which they deserve"). So, the opinion's statement regarding "personal privacy" had nothing to do with the purpose for which Senator Dole introduced it into the congressional record. Moreover, Senator Dole was not even proposing to offer his amendment to Exemption 4 as part of the 1974 amendments to FOIA; instead, it was expected that he would "have the opportunity to offer [that] amendment at a later time, perhaps to a health bill that will be pending." *Id.* at 17,042. It is therefore an extraordinary leap to suggest that Senator Dole's statement would have caused any legislator to think that Exemption 7(C) would apply only to individuals.

The government's legislative history establishes at most that Congress had a particular concern with protecting individual privacy rights in enacting Exemption 7(C). That says nothing about whether Exemption 7(C) also applies to corporations. There is no "require[ment] that every permissible application of a statute be expressly referred to in its legislative history.". *Moskal*, 498 U.S. at 111. On the contrary, it is well-settled that a statute may have applications beyond those Congress expressly contemplates: "'[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001) (quoting *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998)); *see Riegel v. Medtronic, Inc.*, 552 U.S. 312, 326 (2008) ("The operation of a law enacted by Congress need not be seconded by a committee report on pain of judicial nullification."); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) ("In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.").

That principle controls here. As AT&T has explained, the text of Exemption 7(C)—especially read in light of common legal usage, the statutory structure, and Exemption 7(C)'s purposes—encompasses corporations. *See supra* Parts A-D. That Congress's primary focus in enacting that language may have been the protection of individual privacy rights provides no basis for refusing to apply the terms of Exemption 7(C) as written. As the Court has said, "it is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy—even assuming that it is possible to identify that evil from something other than the text of the statute itself. . . . [T]he reach of a statute often exceeds the precise evil to be eliminated." *Brogan v. United States*, 522 U.S. 398, 403 (1998).

2. Wandering even further from the statutory text, the government also relies on (at 34-41) various authorities published after the enactment of the 1974 amendments. Such sources of course can shed no light on the intent of the Congress that passed that legislation. *Cf. California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 331 n.8 (1997) (rejecting the argument that "Congress' unwillingness to amend [a statute] in response to [lower court] decisions is evidence that Congress believed that those opinions accurately interpreted" the statute). Regardless, none of those authorities persuasively supports the government's per se rule that Exemption 7(C) excludes corporations.

The statement in the Attorney General's 1975 memorandum that Exemption 7(C) does not "seem" to apply to corporations provides no help to the government. U.S. Dep't of Justice, *Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act* 9 (Feb. 1975); *cf. Abramson*, 456 U.S. at 622 n.5 (criticizing a party for placing "undue emphasis" on the Attorney General's 1975 memorandum). Such memoranda are "entitled to be taken seriously only to the extent that [they] make[]

persuasive arguments." *Benavides v. DEA*, 968 F.2d 1243, 1248 (D.C. Cir.), *opinion modified on reh'g on other grounds*, 976 F.2d 751 (D.C. Cir. 1992). The 1975 memorandum makes no arguments at all, much less persuasive ones, in support of its tentatively asserted view regarding the scope of Exemption 7(C). It therefore provides no basis to depart from the statutory text.

The government also relies on decisions that observe (in varying degrees of detail) that the personal privacy protections of Exemption 7(C) apply to "individuals." Such observations are uniformly beside the point. No one disputes that Exemption 7(C)'s protection of "personal privacy" encompasses the privacy rights of individuals. It is therefore unremarkable—and irrelevant to the question presented—that courts have discussed individuals when, on the facts before them, an individual's privacy interest was the only thing at stake. *Cf. Favish*, 541 U.S. at 165 ("To say that the concept of personal privacy must 'encompass' the individual's control of information about himself does not mean it cannot encompass other personal privacy interests as well.").

Only one of the cases that the government cites, *Washington Post Co. v. United States Department of Justice*, 863 F.2d 96 (D.C. Cir. 1988), involved Exemption 7(C). But the opinion in *Washington Post* does not indicate that either of the parties resisting the FOIA request in that case argued that disclosure would invade the privacy interests of the corporation (Eli Lilly) that had submitted the document in question. *See id.* at 100-01. Instead, the Department of Justice and Eli Lilly appear to have contended only that disclosure would invade the privacy of particular Eli Lilly employees. *See id.*

The remaining statements the government quotes come from cases interpreting Exemption 6. Even setting aside the textual distinctions between Exemptions 6 and 7(C) (*see supra* pp. 36-37), the statements are unreasoned dicta. In *Multi Ag Media LLC v. Department of Agriculture*, 515 F.3d 1224 (D.C. Cir. 2008), the court rejected the applicability of Exemption 6 because it held that any invasion of privacy would not be "clearly unwarranted" in light of the strong interest in enabling the public to monitor the Department of Agriculture's implementation of the benefit program at issue. *See id.* at 1232 (internal quotation marks omitted). Although the court opined that "businesses . . . do not have protected privacy interests under Exemption 6," it offered that view in discussing an issue that the parties had not "contest[ed]" and in concluding that information in the business records was "traceable to an *individual*" and therefore within the scope of Exemption 6 in any event. *Id.* at 1228. In *Sims v. CIA*, 642 F.2d 562 (D.C. Cir. 1980), the Central Intelligence Agency made "no claim that the names of the institutions participating in" the program at issue could be withheld under Exemption 6. *Id.* at 572 n.47. And, in *National Parks & Conservation Association v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976), the court raised the possible applicability of Exemption 6 on its own and said only that Exemption 6 had "not been extended to protect the privacy interests of businesses or corporations," *id.* at 685 n.44; it did not say that such an extension would be unwarranted in an appropriate case.

The cases the government cites (at 37) for the proposition that Exemptions 6 and 7(C) protect the same privacy interests are even further afield. None considered the question whether either exemption protects any interest in corporate privacy. *See United States Dep't of Defense v. FLRA*, 510 U.S. 487 (1994) (home addresses of federal civil service employees); *Forest Serv. Employees for Envtl. Ethics v. United States Forest Serv.*, 524 F.3d 1021 (9th Cir. 2008) (names of individual employees in government report); *Horowitz v. Peace Corps*, 428 F.3d 271 (D.C. Cir. 2005) (name of individual who had accused government employee of misconduct); *FLRA v. United States Dep't of Veterans Affairs*, 958 F.2d 503 (2d Cir. 1992) (names and addresses of employees in bargaining unit).

Citing then-Professor Scalia's 1981 congressional testimony, the government suggests (at 39) that Justice Scalia has already decided this case. Not so. The most pertinent aspect of that testimony in fact supports AT&T's position. There, Professor Scalia recognized this Nation's "tradition of respect for the autonomy and, except in specified fields, the *privacy* of nongovernmental associations" and spoke of the "*privacy* which has been the right of our private institutions and which many of them require in order to function effectively." 1 *Freedom of Information Act: Hearings Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 97th Cong. 958 (1981) ("*1981 FOIA Hearings*") (emphases added); *see also id.* at 957 ("Observers of American democracy since de Tocqueville have noted the vital importance of private associations, *corporations*, unions, churches, universities, political and social clubs, in preserving freedom by providing diverse centers of power apart from what would otherwise be the all-powerful democratic state.") (emphasis added). That testimony further undermines the government's claim that corporate privacy interests are entirely foreign to American law. True, Professor Scalia criticized FOIA as insufficiently protective of "institutional privacy" interests, *id.*, noting specifically the lack of a corporate parallel to FOIA Exemption 5, which exempts from disclosure government agency memoranda and letters, 5 U.S.C. § 552(b)(5). *See 1981 FOIA Hearings* at 957-58. But the testimony nowhere mentions Exemption 7(C), let alone addresses the merits of the Third Circuit's (and Attorney General Clark's) interpretation of the phrase "personal privacy."

In sum, the government's authorities provide no justification for departing from the plain language of Exemption 7(C). Moreover, the government's claim (at 41) that there is not "a scintilla" of evidence that anyone ever before thought that a corporation could have personal privacy under FOIA is demonstrably wrong. As noted above (*see supra* pp. 32-34), and, as even the government admits (at 35 n.10), in 1967, *the Attorney General himself* advanced the same textual interpretation of the phrase "personal privacy" that the Third Circuit adopted here. The Third Circuit's interpretation is hardly "novel[]" (Gov't Br. 40 (internal quotation marks omitted)). *Cf. Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001) (rejecting dissent's reliance on "long-prevailing Circuit precedent") (internal quotation marks omitted).

F. There Is Nothing Absurd About Recognizing Institutional Privacy Interests Under Exemption 7(C)

The government's claim (at 51-54) that no workable standard exists for agencies and courts to use in measuring institutional privacy interests ignores the long "tradition of respect" for "institutional privacy," *1981 FOIA Hearings* at 957-58, which has been recognized in a number of contexts, including the Fourth Amendment. *See supra* Part B. In *Hale*, for instance, the Court balanced the corporation's interests against the needs of law enforcement to determine whether the challenged governmental action was reasonable under the Fourth Amendment. *See* 201 U.S. at 76-77; *see also Dow Chem.*, 476 U.S. at 234-39 (applying traditional Fourth Amendment principles to determine whether taking aerial photographs of Dow's facility constituted a search); 2 *Criminal Procedure* § 3.9(c), at 358 (discussing cases involving regulatory inspections of businesses). The government is thus wrong to assert (at 53) that no "predicates" exist for corporate privacy interests under Exemption 7(C). Indeed, the claim that the concept of corporate privacy is entirely foreign and unprecedented simply cannot be squared with the Nation's 140-year history of treating corporations "as natural persons for virtually all purposes of constitutional and statutory analysis." *Monell*, 436 U.S. at 687.[13]

The government also asserts (at 53) that "[a] corporation itself can no more be embarrassed, harassed, or stigmatized than a stone." On the contrary, the Second Circuit has expressly recognized in the Double Jeopardy Clause context that corporations can suffer "embarrassment" and "harassment" as a consequence of multiple prosecutions. *Security Nat'l*

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[13] Nothing in *Reporters Committee* or *Favish*, from which the government quotes (at 52-53), is to the contrary. Those cases explicated the privacy interests involved in the possible disclosure of an individual's rap sheet (*Reporters Committee*) and photographs of a deceased relative (*Favish*). Neither case purported to provide a comprehensive account of the privacy interests that Exemption 7(C) protects.

Bank, 546 F.2d at 494-95. And this Court has acknowledged in other contexts that litigation can be used "to harass large companies through a multiplicity of small claims," *NAACP v. Button*, 371 U.S. 415, 441 (1963), and that disclosure of campaign finance information can result in "harassment directed against [an] organization itself," *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (per curiam). In fact, it is quite common to speak of corporations and other organizations as being "embarrassed," "harassed," and "stigmatized."[14] More fundamentally, the government's claim simply cannot be squared with the longstanding recognition of corporations as having similar reputational interests as individuals for purposes of, for example, the law of defamation. *See* Restatement (Second) of Torts § 561 cmt. b ("A corporation for profit has a business reputation and may therefore be defamed in this respect."). To say that a corporation has been "embarrassed" is just another way of saying that its reputation has been damaged.

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[14] *See, e.g.*, Verne G. Kopytoff, *Rival Ordered To Pay Oracle Over $1 Billion*, N.Y. Times, Nov. 24, 2010, at A1 (referring to Oracle's efforts "to embarrass another rival, Hewlett-Packard"); Charlie Savage & Andrew W. Lehren, *State's Secrets Day 2: Cables Depict Coaxing By U.S. in Bid to Clear Guantanamo's Prison*, N.Y. Times, Nov. 30, 2010, at A1 ("The suicide bomber proved deeply embarrassing for the Kuwaiti government."); Salman Masood, *Anticorruption Group Claims Harassment in Pakistan*, N.Y. Times, Nov. 30, 2010, at A14 ("The head of the Pakistani branch of Transparency International, the global advocacy group that monitors corruption, has alleged intimidation and harassment by government officials for its monitoring of American aid in Pakistan."); Alan Feuer, *Battle Over the Bailout*, N.Y. Times, Feb. 14, 2010, at MB1 (reporting the Federal Reserve's concern that disclosing the identities of financial institutions that borrowed money from it in the fall of 2008 could "stigmatize" those institutions).

The government provides no support for its suggestion (at 50-51) that treating foreign, state, and local governments as persons with privacy interests under Exemption 7(C) would be absurd, aside from its unpersuasive claim (at 51), addressed above, that institutional privacy interests are "wholly novel and nonintuitive." FOIA contains multiple protections for the federal government's own privacy interests, *see, e.g.*, 5 U.S.C. § 552(b)(1), (2), (5), (7)(A), (7)(E), which seriously weakens the government's claim that foreign, state, and local governments cannot have similar interests. Indeed, Exemption 7(D) expressly recognizes one such interest in nondisclosure, exempting information that could disclose the identity "of a confidential source, including a State, local, or foreign agency or authority." 5 U.S.C. § 552(b)(7)(D).[15]

The Executive Branch is free to address to Congress its disagreement with the congressional decision to include corporations within the protections of Exemption 7(C). But this Court "will not alter the text [of the statute] in order to satisfy the policy preferences of the [Acting Solicitor General]." *Barnhart*, 534 U.S. at 462.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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[15] As AT&T has acknowledged, corporate privacy claims may not be entitled to the same weight as individuals' claims, and it may be that any claim raised by a governmental entity would be entitled to even less weight.

Respectfully submitted,

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December 9, 2010

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STATUTORY AND REGULATORY ADDENDUM

1. 1 U.S.C. § 1 provides:

§ 1. Words denoting number, gender, and so forth

In determining the meaning of any Act of Congress, unless the context indicates otherwise—

words importing the singular include and apply to several persons, parties, or things;

words importing the plural include the singular;

words importing the masculine gender include the feminine as well;

words used in the present tense include the future as well as the present;

the words "insane" and "insane person" and "lunatic" shall include every idiot, lunatic, insane person, and person non compos mentis;

the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals;

"officer" includes any person authorized by law to perform the duties of the office;

"signature" or "subscription" includes a mark when the person making the same intended it as such;

"oath" includes affirmation, and "sworn" includes affirmed;

"writing" includes printing and typewriting and reproductions of visual symbols by photographing, multigraphing, mimeographing, manifolding, or otherwise.

2. 5 U.S.C. § 551(2) provides:

§ 551. Definitions

For the purpose of this subchapter—

* * * * *

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

* * * * *

3. 5 U.S.C. § 552 provides in relevant part:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

* * * * *

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

* * * * *

(b) This section does not apply to matters that are—

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—

(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

* * * * *

(f) For purposes of this section, the term—

* * * * *

(2) "record" and any other term used in this section in reference to information includes—

(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and

(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

* * * * *

4. 47 C.F.R. § 0.457 provides in relevant part:

§ 0.457 Records not routinely available for public inspection.

The records listed in this section are not routinely available for public inspection pursuant to 5 U.S.C. 552(b). The records are listed in this section by category, according to the statutory basis for withholding those records from inspection; under each category, if appropriate, the underlying policy considerations affecting the withholding and disclosure of records in that category are briefly outlined. Except where the records are not the property of the Commission or where the disclosure of those records is prohibited by law, the Commission will entertain requests from members of the public under § 0.461 for permission to inspect particular records withheld from inspection under the provisions of this section, and will weigh the policy considerations favoring non-disclosure against the reasons cited for permitting inspection in the light of the facts of the particular case. In making such requests, there may be more than one basis for withholding particular records from inspection. The listing of records by category is not intended to imply the contrary but is solely for the information and assistance of persons making such requests. Requests to inspect or copy the transcripts, recordings or minutes of closed agency meetings will be considered under § 0.607 rather than under the provisions of this section.

(a) *Materials that are specifically authorized under criteria established by Executive Order (E.O.) to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order, 5 U.S.C. 552(b)(1).*

* * * * *

(b) *Materials that are related solely to the internal personnel rules and practices of the Commission, 5 U.S.C. 552(b)(2).*

* * * * *

(c) *Materials that are specifically exempted from disclosure by statute (other than the Government in the Sunshine Act, 5 U.S.C. 552b, provided that such statute either requires that the materials be withheld from the public in such a manner as to leave no discretion on the issue, or establishes particular criteria* *for withholding or refers to particular types of materials to be withheld).* * * * * *

* * * * *

(d) *Trade secrets and commercial or financial information obtained from any person and privileged or confidential—categories of materials not routinely available for public inspection, 5 U.S.C. 552(b)(4) and 18 U.S.C. 1905.*

(1) The materials listed in this paragraph have been accepted, or are being accepted, by the Commission on a confidential basis pursuant to 5 U.S.C. 552(b)(4). To the extent indicated in each case, the materials are not routinely available for public inspection. If the protection afforded is sufficient, it is unnecessary for persons submitting such materials to submit therewith a request for non-disclosure pursuant to § 0.459. A persuasive showing as to the reasons for inspection will be required in requests submitted under § 0.461 for inspection of such materials.

(i) Financial reports submitted by radio or television licensees.

(ii) Applications for equipment authorizations (type acceptance, type approval, certification, or advance approval of subscription television systems), and materials relating to such applications, are not routinely available for public inspection prior to the effective date of the authorization. The effective date of the authorization will, upon request, be deferred to a date no earlier than that specified by the applicant. Following the effective date of the authorization, the application and related materials (including technical specifications and test measurements) will be made available for inspection upon request (see

§ 0.460). Portions of applications for equipment certification of scanning receivers and related materials will not be made available for inspection.

(iii) Information submitted in connection with audits, investigations and examination of records pursuant to 47 U.S.C. 220.

(iv) Programming contracts between programmers and multichannel video programming distributors.

(v) The rates, terms and conditions in any agreement between a U.S. carrier and a foreign carrier that govern the settlement of U.S. international traffic, including the method for allocating return traffic, if the U.S. international route is exempt from the international settlements policy under § 43.51(e)(3) of this chapter.

(vi) Outage reports filed under Part 4 of this chapter.

(vii) The following records, relating to coordination of satellite systems pursuant to procedures codified in the International Telecommunication Union (ITU) Radio Regulations:

* * * * *

(2) Unless the materials to be submitted are listed in paragraph (d)(1) of this section and the protection thereby afforded is adequate, any person who submits materials which he or she wishes withheld from public inspection under 5 U.S.C. 552(b)(4) must submit a request for non-disclosure pursuant to § 0.459. If it is shown in the request that the materials contain trade secrets or privileged or confidential commercial, financial or technical data, the materials will not be made routinely available for inspection; and a persuasive showing as to the reasons for inspection will be required in requests for inspection

submitted under § 0.461. In the absence of a request for non-disclosure, the Commission may, in the unusual instance, determine on its own motion that the materials should not be routinely available for public inspection.

(e) *Interagency and intra-agency memoranda or letters, 5 U.S.C. 552(b)(5).* * * * * *

(f) *Personnel, medical and other files whose disclosure would constitute a clearly unwarranted invasion of personal privacy, 5 U.S.C. 552(b)(6).* * * * * *

(g) *Under 5 U.S.C. 552(b)(7), records compiled for law enforcement purposes, to the extent that production of such records:*

(1) Could reasonably be expected to interfere with enforcement proceedings;

(2) Would deprive a person of a right to fair trial or an impartial adjudication;

(3) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(4) Could reasonably be expected to disclose the identity of a confidential source;

(5) Would disclose investigative techniques or procedures or would disclose investigative guidelines if such disclosure could reasonably be expected to risk circumvention of the law; or

(6) Could reasonably be expected to endanger the life or physical safety of any individual.

REPLY
BRIEF

Supreme Court, U.S.
FILED

JAN 10 2011

OFFICE OF THE CLERK

No. 09-1279

IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Petitioners,

v.

AT&T INC. AND COMPTEL,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

REPLY BRIEF OF RESPONDENT COMPTEL IN SUPPORT OF PETITIONERS

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January 2011

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REPLY BRIEF OF COMPTEL

At issue in this case is the meaning of the term "personal privacy" in Exemption 7(C). Despite AT&T's claims that "common legal usage" demonstrates that corporations have "personal privacy" interests, AT&T Br. 9, AT&T does not cite a single instance outside of this case in which anyone has ever used the term "personal privacy" to refer to corporate interests in confidentiality.

Nonetheless, AT&T contends it is "plain" that the term "personal privacy" in Exemption 7(C) includes corporate interests. AT&T rests its argument on a supposedly "basic principle of grammar and usage": that when Congress provides a technical definition for a noun used in a statute, it "necessarily," albeit silently, defines any adjective whose dictionary definition includes "of or pertaining to" that noun's ordinary meaning. AT&T Br. 14, 16. Not surprisingly, AT&T can cite no court besides the court below that has ever applied this supposedly basic "principle," the adoption of which would unsettle the meaning of words throughout the U.S. Code, leading to absurd results.

For over 35 years, it has been well understood that Exemption 7(C) protects only individual privacy interests. This interpretation is derived from the meaning of "personal privacy" and is confirmed by reading Exemption 7(C) in the context of FOIA's other exemptions, which include a separate exemption for commercial interests in confidentiality and which only otherwise refer to "personal privacy" in the context of records such as personnel and medical files. It is also supported by FOIA's legislative history and by the purposes of FOIA and Exemption 7(C). As these tools of statutory interpretation confirm, "personal privacy" in Exemption 7(C) does not include corporate interests.

A. The APA's Definition of "Person" Does Not Displace the Ordinary Meaning of "Personal Privacy."

COMPTEL demonstrated in its opening brief that the ordinary meaning of "personal privacy," as derived from its component words and as reflected in its use by both this Court and Congress, includes only the privacy of human beings. See COMPTEL Br. 9-14. In response, AT&T contends that because "person" is defined in the APA to include corporations and because "personal" is the "adjective form" of person, "personal" "necessarily" also includes corporations. AT&T Br. 14. Despite AT&T's insistence that "the adjective form of a noun draws its meaning from the noun," *id.* at 16, AT&T is unable to cite a single authority or court besides the Third Circuit that has *ever* stated or applied the "basic principle of grammar and usage," *id.*, that when Congress defines a noun, it automatically defines the "adjective form" of the noun, such that courts must ignore the adjective's ordinary meaning, statutory context, and all other tools of statutory interpretation in interpreting the adjective.[1] Nor is this

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[1] Even the concurrence in *Delaware River Stevedores v. DiFidelto*, 440 F.3d 615 (3d Cir. 2006), the only source AT&T and the court below cite for the proposition that "a statute which defines a noun has thereby defined the adjectival form of that noun," *id.* at 623 (Fisher, J., concurring, and disagreeing on this point with the majority, which considered the adjective undefined), referred to this proposition not as a rule but as an "inference" and proceeded to find that other factors in that case made the adjective at issue there ambiguous.

"principle" apparently known by Congress, which, as COMPTEL showed in its opening brief, regularly defines variants of defined terms when it wants the variants to reflect the same meaning as the defined term. *See* COMPTEL Br. 16.

Moreover, AT&T's rule of grammar does not withstand examination. What AT&T apparently means in saying that "personal" is the "adjective form" of "person" is that dictionary definitions of "personal" include "[o]f or pertaining to a particular person." AT&T Br. 9 (citing *Webster's New Int'l. Dictionary* 1828 (2d ed. 1950)). According to AT&T, because some dictionaries define "personal" as "of or relating to a particular person," and because the APA defines "person" to include an "individual, partnership, corporation, association, or public or private organization," 5 U.S.C. § 551(2), "personal" in the APA must mean "'of or pertaining to a particular' 'individual, partnership, corporation, association, or public or private organization.'" AT&T Br. 15. But when Congress defines a word "for the purpose" of a statute, as it did in the APA, 5 U.S.C. § 551, it is defining the word whenever it is used *in that statute*, not whenever it is used in a dictionary definition of another word in the statute.[2] Likewise, when the dictionary uses the word "person" in defining "personal," it is using the ordinary meaning of that word, not the word as it is defined in the APA. Thus, when dictionaries define "personal" as "of or relating to a particular person," they are using the ordinary meaning of "person," which AT&T concedes is a human being. AT&T Br. 16.

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[2] For example, FOIA uses the term "individual," *see, e.g.*, 5 U.S.C. § 552(b)(7)(F), and dictionary definitions of "individual" include "a particular person." *Webster's Third New Int'l Dictionary* 1152 (1961). But even AT&T agrees that the word "individual" in FOIA does not refer back to the APA's definition of "person." AT&T Br. 30-31.

Indeed, as COMPTEL demonstrated in its opening brief (at 17-20), interpreting "personal" solely according to the statutory definition of "person" would lead to absurd results. AT&T attempts to distinguish two examples COMPTEL used—"personal injury" and "personal property"—by asserting that those phrases are terms of art in which "personal" is *not* the "adjective form" of "person." AT&T Br. 41. But the first definition of "personal injury" in the dictionary AT&T cites includes "any harm caused to a person." *Black's Law Dictionary* 857 (9th ed. 2009).[3] Thus, if one accepts AT&T's concept of "adjective forms of nouns," "personal" is being used as the "adjective form" of "person" in "personal injury," relating the injury directly to a "person." Accordingly, under AT&T's theory, "personal injury" should include "corporate injury" in statutes that define "person" to include corporations. In any event, AT&T's efforts to distinguish "personal injury" and "personal property" show that even AT&T recognizes that "personal" does not, in fact, always mean "of or relating to a person" where a statute defines "person" to include corporations. *See generally* COMPTEL Br. 11 (citing definitions of "personal").

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[3] AT&T skips the first definition of "personal injury" in *Black's* and cites subsequent definitions to state that "'personal injury' generally refers to 'bodily injury' or 'mental suffering.'" AT&T Br. 41. True, but that only shows, as COMPTEL pointed out in its opening brief (at 11), that the term "personal" connects the words it modifies with particularly human interests. Although AT&T relies on definitions of "personal injury" that include "bodily injury," it ignores definitions of "personal" that include "bodily." *See, e.g.*, *Webster's Third New Int'l Dictionary* 1686 (1961).

Moreover, although COMPTEL used "personal property" and "personal injury" as examples precisely because they have well-known meanings, and therefore clearly demonstrate the absurdity of rigidly interpreting "personal" according to a statutory definition of "person," they were just examples: The ludicrous ramifications of AT&T's rule extend beyond terms it can dismiss as terms of art, and even beyond phrases that include the word "personal." For example, AT&T would presumably consider "commercial" to be the "adjective form" of "commerce"; 42 U.S.C. § 6291(17) defines "commerce" for the purposes of an energy conservation program for consumer products as interstate commerce or commerce that affects interstate commerce; and the term "commercial refrigerator" is not a term of art. Nonetheless, it would be absurd to interpret "commercial refrigerator" when used in the context of that energy conservation program, *id.* § 6291(40), to mean refrigerators that affect inter-state commerce. Similarly, AT&T would presumably consider "licensed" to be the "adjective form" of "license," and 15 U.S.C. § 662(7) defines "license" for the purposes of the small business investment program to be a certain type of license issued by the Small Business Administration. Yet it would be nonsensical to interpret the requirement in 15 U.S.C. § 696(3)(E)(ii) that certain property provided as collateral for a loan have been appraised by a "State licensed or certified appraiser" to mean that the appraiser should have received from a State a license issued by the Small Business Administration. AT&T's new "principle" of statutory interpretation would unsettle the meaning of well-understood words throughout federal statutes and regulations. This Court should reject AT&T's invitation to replace existing tools of statutory interpretation with a formalistic rule that would have far-reaching, unreasonable results.

B. AT&T Cites No Authority in Which "Personal Privacy" Is Used to Refer to Corporate Interests.

AT&T devotes the largest section of its brief to arguing that corporations can have "privacy" interests. *See* AT&T Br. 18-30. The relevant term in Exemption 7(C), however, is not just "privacy." It is "personal privacy." Notably, despite AT&T's insistence that "[c]ommon legal usage belies the government's claim that the words 'personal privacy' cannot be used in connection with corporations," *id.* at 9, AT&T does not cite a single instance, either in legal usage or elsewhere, in which anyone has ever used the term "personal privacy" to refer to corporate interests in confidentiality.

Rather than focus on the meaning of the term at issue in this case, AT&T takes its reader on a journey into concepts of corporate personhood and corporate constitutional rights, touching on the First, Fourth, Fifth, and Fourteenth Amendments, including the Due Process Clause, Equal Protection Clause, and Double Jeopardy Clause. But this case is not about whether corporations are "persons"—all parties agree that the APA defines them to be for FOIA purposes, 5 U.S.C. § 551(2)—nor is it about what constitutional provisions apply to them. It is about what Congress intended in using the words "personal privacy" in Exemption 7(C). That corporations are sometimes considered "persons" or that they have certain constitutional rights does not answer the question whether the term "personal privacy" encompasses corporate interests in confidentiality.

In any event, the constitutional provisions on which AT&T relies cannot carry the weight that AT&T places on them. AT&T devotes pages to discussing "corporate privacy interests under the Fourth Amendment." AT&T Br. 21-23. But the word "privacy" is used to describe many different interests. *See, e.g.*, William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 389 (1960) (noting that, even just in the context of torts, "[t]he law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common"); Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. Pa. L. Rev. 477, 477-78 (2006) (noting that privacy suffers from an "'embarrassment of meanings'" and setting forth a new taxonomy of privacy (citation omitted)). The "right to privacy" protected by the Fourth Amendment is connected to the right to be free from certain governmental intrusions onto "persons, houses, papers, and effects." U.S. Const. Am. IV. That interest is a far cry from the "personal privacy" interests protected by Exemption 7(C), which involve public disclosure of personal information, not "unreasonable searches and seizures." *Id.* That, in a different context, the word "privacy"—unconnected to the word "personal" and referring to a different underlying interest—has sometimes been used in connection with corporations does not change the fact that the word privacy on its own generally connotes individual interests, let alone say anything about the meaning of "personal privacy."

AT&T's discussion of the Double Jeopardy Clause is even further afield. AT&T strenuously argues that corporations are protected by the Double Jeopardy Clause, apparently on the theory that if corporations are protected by the Double Jeopardy Clause, it would make sense for them also to be protected by Exemption 7(C) because the Double Jeopardy Clause is intended to protect defendants from embarrassment and Exemption 7(C) is intended to protect people such as witnesses from embarrassment. AT&T's logic does not hold up. The purpose of the Double Jeopardy Clause is not primarily to protect defendants from embarrassment, but to keep the government from being able to use second trials for the same offense as "a potent instrument of oppression." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977); *see also id.* (explaining that Double Jeopardy Clause prohibits the government from making repeated attempts to convict defendants, thereby subjecting them to "embarrassment, expense and ordeal," "a continuing state of anxiety and insecurity," and the enhanced "possibility that even though innocent [they] may be found guilty" (citing *Green v. United States*, 355 U.S. 184, 187-88 (1957)). Because the purpose of the Clause is not simply to prevent embarrassment, whether corporations are covered by it says nothing about whether corporations can feel embarrassed, let alone about whether Congress intended the words "personal privacy" in Exemption 7(C) to apply to corporate interests.

In contrast to the great "weight of . . . authority" it finds in the Fourth Amendment and Double Jeopardy Clause, AT&T Br. 25, AT&T dismisses any reference to the common law, noting that "[t]he question of the statutory meaning of privacy under the FOIA is . . . not the same as the question whether a tort action might lie for invasion of privacy." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762 n.13 (1989). AT&T misses the point. No one is claiming that the common law, on its own, conclusively demonstrates the meaning of "personal privacy" in Exemption 7(C). But the Restatement's limitation of actions for "invasion of privacy" (except for appropriation of name or likeness) to individuals, *see* Restatement (Second) of Torts § 652I (1977), and its recognition that a corporation "has no personal right of privacy," *id.* at Comment C, shed light on what Congress intended when it used the term "invasion of personal privacy" in Exemption 7(C).

AT&T also takes issue with the Government's (and by implication COMPTEL's) citation to *United States v. White*, 322 U.S. 694 (1944), in which this Court stated that because the privilege against self-incrimination is purely personal, it cannot be asserted by a corporation. AT&T claims that *White* only meant that a corporate representative cannot assert the privilege on behalf of the corporation. AT&T Br. 28 n.8. *White*, however, specifically states that "[t]he constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals." 322 U.S. at 699. "Since the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation." *Id.* AT&T also argues at length that the privilege against compulsory self-incrimination has changed since *White* to not cover documents' contents. But that change has not affected the Court's different treatment of corporations and natural people under the privilege. *See, e.g., First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978) (noting that "[c]ertain 'purely personal' guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations" (citing *White*, 322 U.S. at 698-701)). In any event, *White* is relevant not because this Court's understanding of the privilege against compulsory self-incrimination informs the scope of Exemption 7(C), but because this Court's understanding of the meaning of "personal" informs the scope of the exemption. Although this Court's understanding of the privilege might have changed since *White*, there is no indication that its understanding of "personal" has changed.

C. The Context, Structure, History, and Purposes of FOIA All Demonstrate That "Personal Privacy" in Exemption 7(C) Refers Solely to the Privacy of Individuals.

Traditional tools of statutory construction confirm that "personal privacy" in Exemption 7(C) refers solely to human interests. The exemption's "personal privacy" language was borrowed from and intended to provide the same protections as identical language in Exemption 6, which applies only to individuals. FOIA contains a different exemption, Exemption 4, that applies to commercial interests in confidentiality. And interpreting "personal privacy" to protect only individuals furthers the purposes of both FOIA overall and of the amendment that added Exemption 7(C) to the statute. AT&T's argument that "personal privacy" should not be given its ordinary meaning in Exemption 7(C) fails.

1. ***Exemption 7(F) and the Privacy Act.*** AT&T notes that both FOIA Exemption 7(F) and the Privacy Act use the noun "individual" to refer to a human being and argues that Congress could have used that word in Exemption 7(C) as well. AT&T Br. 30. No one questions that because of the APA's definition of "person," the nouns "person" and "individual" have different meanings in both FOIA and the Privacy Act, with the noun "individual" referring solely to humans and the noun "person" also including corporations and associations. Because Exemption 7(C) does not use *either* noun, however, their different meanings are irrelevant.

AT&T grasps onto the Privacy Act's use of the term "individual privacy" and implies that if Congress had wanted to limit Exemption 7(C) to human privacy rights, it could have used that term instead. But AT&T's argument *assumes* that corporations have "personal privacy" interests. If, as COMPTEL has demonstrated, "personal privacy" includes only human privacy interests, then Congress did not *need* to use the term "individual privacy" to indicate its intention to cover only human privacy interests because the term it chose to use also only refers to human privacy interests.

Indeed, in addition to using the term "individual privacy," the Privacy Act uses the term "personal privacy." *Privacy Act of 1974*, Pub. L. No. 93-579, § 2(B), 88 Stat. 1896. AT&T concedes that when Congress used "personal privacy" in the Privacy Act it "intended to address only the . . . privacy of individuals." AT&T Br. 32. Given that

Congress used "personal privacy" and "individual privacy" interchangeably in the Privacy Act, no intent to cover corporate interests can be read into Congress's use of "personal privacy" instead of "individual privacy" in Exemption 7(C).

2. ***Exemption 6.*** When Congress enacted Exemption 7(C), it borrowed the term "personal privacy" from Exemption 6, which applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). As Senator Hart, who introduced the amendment that included Exemption 7(C), explained, "[b]y adding the protective language here, we simply make clear that the protections in the sixth exemption for personal privacy also apply to disclosure under the seventh exemption." 120 Cong. Rec. 17033 (May 30, 1974) (Statement of Sen. Hart).

In enacting Exemption 6, Congress sought to "'protect[] an individual's right of privacy'... by preventing 'the disclosure of [information] which might harm the individual.'" *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 601 (1982) (quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966)); *see also id.* at 599 (Exemption 6 "seeks to protect individuals"); H.R. Rep. No. 1497, at 11 (explaining that the exemption was "intended to cover detailed Government records on an individual which can be identified as applying to that individual"). Accordingly, and consistent with the ordinary, well-understood meaning of the term, "personal privacy" in Exemption 6 has long been recognized as referring solely to individual interests. *See, e.g., Multi Ag Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1228 (D.C. Cir. 2008) ("It is clear that businesses themselves do not have protected privacy interests under Exemption 6."); *Sims v. CIA*, 642 F.2d 562, 573 n.47 (D.C. Cir. 1980) ("Exemption 6 is applicable only to individuals."); *Wash. Post Co. v. U.S. Dep't of Agric.*, 943 F. Supp. 31, 37 n.6 (D.D.C. 1996) ("[C]orporations, businesses and partnerships have no privacy interest whatsoever under Exemption 6."); *Ivanhoe Citrus Ass'n v. Handley*, 612 F. Supp. 1560, 1567 (D.D.C. 1985) ("It is well-established . . . that neither corporations nor business associations possess protectible privacy interests [under Exemption 6]."); *see also, e.g.*, U.S. House of Reps., 103d Cong., 1st Sess., Report No. 103-104, *First Report by the Committee on Gov't Reform: A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records* 14 (May 1993) ("Corporations and other legal persons have no privacy rights under the sixth exemption."); U.S. Dep't of Justice, *FOIA Update*, Vol. III, No. 4, at 5 (May 1982) ("It is well settled that the FOIA's privacy exemptions provide personal privacy protection and cannot be invoked to protect the interests of a corporation or association.").

In the face of the vast authority recognizing that "personal privacy" in Exemption 6 refers solely to individual interests, AT&T devotes pages to a single source, the Attorney General's 1967 memorandum on FOIA, which referred to Exemption 6 as protecting the "privacy of any person" and stated that "person" includes corporations. U.S. Dep't of Justice, *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 36-37 (1967). Exemption 6, of course, does not actually refer to the "privacy of any person." And although, in *National Archives and Records*

Administration v. Favish, 541 U.S. 157, 169 (2004), the Court noted that "the Attorney General's *consistent* interpretation" of Exemption 6 as protecting families formed part of the background against which Congress legislated when it enacted Exemption 7(C), *id.* (emphasis added), here, the Attorney General quickly abandoned its initial opinion of how to interpret "personal privacy." *See, e.g.*, U.S. Dep't of Justice, *Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act* 9 (1975) (explaining that "the phrase 'personal privacy' pertains to the privacy interests of individuals"). In any event, by the time Congress enacted the 1974 amendments, the notion that FOIA's "personal privacy" language might apply to corporate interests had been rejected. *See Wash. Research Project, Inc. v. Dep't of Health, Educ., & Welfare*, 366 F. Supp. 929 (D.D.C. 1973), *aff'd in part on other grounds*, 504 F.2d 238 (D.C. Cir. 1974) (explaining that "the right of privacy envisioned in the Act is personal and cannot be claimed by a corporation or association").[4]

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[4] AT&T also implies that in *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 153 (D.C. Cir. 2006), the D.C. Circuit applied Exemption 6 to corporate interests. But although the redacted information in *Judicial Watch* included names and addresses of companies that worked on developing mifepristone (RU-486), the reason that information was redacted was not to protect the companies' privacy, but the privacy of the companies' employees. *See id.* (explaining that the declarations in the case "describe websites that encourage readers to look for mifepristone's manufacturing locations and then kill or kidnap employees" and that the "privacy interest extends to all . . . employees [associated with mifepristone]"). Indeed, the case refers to the interest to be

(continued...)

AT&T insists that if Exemption 6 is limited to individuals, it is not because of the term "personal privacy," but "because the exemption applies only to 'personnel and medical files and similar files.'" AT&T Br. 36 (quoting 5 U.S.C. § 552(b)(6)). But corporations, along with individuals, can be discussed in personnel, medical, or similar files. And both Congress and this Court have connected Exemption 6's protection of individuals to its personal-privacy clause, not just its threshold clause. *See, e.g., Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976) (explaining that the "device adopted" to balance the "individual's right of privacy" against FOIA's goal of opening agency action to the light of public scrutiny was "the limited exemption, where privacy was threatened, for 'clearly unwarranted' invasions of personal privacy"); S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965) ("The phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the public's right to governmental information.").

Unable to muster any real support for the notion that Exemption 6's "personal privacy" language applies to corporate interests, AT&T asserts that the term "personal privacy" in Exemption 7(C) might include interests not covered by the same term in Exemption 6. AT&T Br. 38. It is a "normal rule of statutory construction," however, "that identical words used in different parts of the same act

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[4](...continued)
weighed on the privacy side of the Exemption 6 balance as "'the individual's right of privacy.'" *Id.* (citation omitted).

are intended to have the same meaning." *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (internal quotation marks and citation omitted). "A term appearing in several places in a statutory text is generally read the same way each time it appears." *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994).

Moreover, the legislative history shows that Congress intended Exemption 7(C) to protect the same interests as Exemption 6. As Senator Hart explained, "the protection for personal privacy included in [7(C)] . . . is a part of the sixth exemption in the present law." 120 Cong. Rec. 17033 (May 30, 1974) (Statement of Sen. Hart). "By adding the protection language here, we simply make clear that the protections in the sixth exemption for personal privacy also apply to disclosure under the seventh exemption." *Id.*[5]

In the end, AT&T falls back on the assertion that it is irrelevant whether Congress intended Exemption 7(C) to cover corporations, because the terms of the statute must be "appl[ied] . . . as written." AT&T Br. 49. But FOIA's structure and legislative history are in no way at odds with its text. To the contrary, they confirm what the plain language already makes clear: Exemption 7(C) protects only individual interests.

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[5] This Court has repeatedly looked to Senator Hart's statements on the Senate floor in interpreting Exemption 7. *See FBI v. Abramson*, 456 U.S. 615, 628 n.11 (1982); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 227-32 (1978). AT&T abridges the quote above, claiming that Senator Hart "said *only* that 'the protections in the sixth exemption for personal privacy also apply to disclosure under the seventh exemption,'" AT&T Br. 38 (emphasis added), and that Senator Hart's statement, therefore, does not show that Exemption 7(C) does not also cover additional interests. As the full quote above demonstrates, however, Senator Hart did not just state that Exemption 6's protections were included in Exemption 7(C); he also stated that Exemption 7(C)'s protections were already part of Exemption 6.

3. ***Exemption 4***. Interpreting FOIA's "personal privacy" exemptions in the context of FOIA's other exemptions further confirms that "personal privacy" carries its ordinary meaning in Exemption 7(C). In particular, Exemption 4 applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). This exemption, rather than the personal-privacy exemptions, is the means through which Congress chose to protect business interests in confidentiality.

AT&T points out that Exemption 4 does not apply to records just because their release might cause the public to dislike or distrust a company, AT&T Br. 39-41, and argues, therefore, that records the release of which might hurt a company's reputation should be exempt under Exemption 7(C). Just because Exemption 4 does not apply to all of the records AT&T wants to keep secret, however, does not mean that some other exemption does. FOIA contains specific, narrow, *exclusive* exemptions. 5 U.S.C. § 552(d). If records fall outside of those exemptions, they must be disclosed, whether or not AT&T wishes otherwise. Exemption 4 shows that Congress gave thought to which commercial secrecy interests should be protected and which should not, and there is no indication that Congress wished to protect corporations from being disliked by customers or suppliers who learn of their actions. Corporate secrecy interests that fall outside of Exemption

4's protections should not be crammed into an exemption designed for different purposes.

4. ***The Purposes of Exemption 7(C).*** Exemption 7(C) protects the "'individual interest in avoiding disclosure of personal matters'" contained in law enforcement records. *Reporters Comm. for Freedom of the Press*, 489 U.S. at 762 (citation omitted); *see also, e.g., Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1058 (3d Cir. 1995) (recognizing privacy interests of "'individuals involved in a criminal investigation'" (citation omitted)); *Bast v. U.S. Dep't of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981) (balancing the "individual's interest in personal privacy"). Extending the exemption's protections to corporations would not further this purpose.

AT&T contends that Exemption 7(C) is meant to cover the interests of *all* entities mentioned in law enforcement records. But there is no reason to think that, in enacting Exemption 7(C), Congress was concerned about anyone but individuals mentioned in law enforcement records. Nor is there anything incongruous with Congress being particularly concerned about people and whether their privacy has been invaded. There is a qualitative difference between human privacy concerns and corporate interests in confidentiality. For example, notwithstanding AT&T's claims to the contrary, AT&T Br. 55, embarrassment is *not* a synonym for reputational damage; it is the *emotion* one feels when one of a number of things, including reputational harm, take place. *See Webster's Third New Int'l Dictionary* 739 (1961) (defining "embarrass" as "to cause to experience a state of self-conscious distress"). Because they do not experience emotions, corporations cannot feel embarrassed. Nor can they feel dishonored, or undignified, or fear for their physical safety.

Rather than seeking to create an exemption that would permit withholding of law enforcement records that mention corporations, Congress amended Exemption 7 in 1974 in part to shed light on government investigations into corporate compliance with the law. Senator Hart explained that he introduced the amendment out of "fear that such information as meat inspection reports, civil rights compliance information, and medicare nursing home reports will be considered exempt under the seventh exemption." 120 Cong. Rec. 17033 (May 30, 1974) (Statement of Sen. Hart). AT&T downplays this purpose, noting that even if corporate interests in secrecy are protected under Exemption 7(C), records will be subject to the exemption's balancing test and therefore might be released. There is no indication, however, that, in trying to "plug the loophole" that had been "construed by agencies to preclude access to meat inspection reports, OSHA safety reports, airline safety analyses and reports on medical care in federally supported nursing homes," 120 Cong. Rec. 36626 (Nov. 20, 1974) (statement of Rep. Reid), Congress intended to create a new exemption to cover such records and to require people seeking such records to have to affirmatively explain why the public interest in disclosure outweighs the business's interest in confidentiality.

In an attempt to show why an exemption designed to protect people should be extended to cover corporations, AT&T argues that interpreting "personal privacy" to cover only individuals could "chill voluntary cooperation by corporations and other organizations in law enforcement" and make corporations "less willing" to report wrongdoing. AT&T Br. 43. But, until the decision below, Exemption 7(C) had been construed to cover only individual interests. AT&T does not explain why interpreting the exemption the way it has always been interpreted would make corporations less willing to cooperate with the government than they have been. And the government itself does not seem concerned that giving "personal privacy" its ordinary meaning will in any way interfere with its law enforcement endeavors.

Congress chose to protect "personal privacy" in Exemption 7(C). The ordinary meaning of that term, FOIA's structure, its legislative history, and the purposes of the statute all demonstrate that only individuals have protected interests under Exemption 7(C). "Personal privacy" and Exemption 7(C) should not be extended to corporate interests.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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January 2011

REPLY BRIEF

Supreme Court, U.S.
FILED
JAN 1[illegible] 2011
OFFICE OF THE CLERK

No. 09-1279

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
PETITIONERS

v.

AT&T INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The court of appeals has held that the "personal privacy" protection of Exemption 7(C) of the Freedom of Information Act (FOIA) extends beyond the privacy of individuals and safeguards the so-called "privacy" of corporations. That novel holding is a singular outlier in the 36-year history of Exemption 7(C) (Gov't Br. 34-41) for multiple reasons: The term "personal privacy" itself applies only to the privacy interests of individuals, *id.* at 17-20, 41-44; other FOIA exemptions confirm that Exemption 7(C) protects only individuals' interests, *id.* at 20-27, 42, 44-46; and the Exemption's 1974 drafting history shows that Congress understood that it was safeguarding only individuals' privacy interests, *id.* at 27-34. If the court of appeals' reasoning were adopted, it would confer "personal privacy" rights not only upon corporations but upon foreign, state, and local governmental entities. *Id.* at 50-54. Nothing suggests that Congress ever intended such anomalous results.

AT&T does not dispute that the ordinary meaning of "personal" applies only to individuals. It instead argues that "[t]he difference here is the statutory definition of 'person'"—which covers corporations—and the effect of what AT&T asserts is a "grammatical imperative" that requires the word "personal" to take its meaning from that definition of "person." Br. 14-16 (citation omitted). On that premise, AT&T then seeks to fit its strained reading into "common legal usage," *id.* at 18-30; FOIA's structure, *id.* at 30-41; and Exemption 7(C)'s purpose, *id.* at 41-46.

AT&T's contentions are without merit. No "grammatical imperative" demands that the meaning of an adjective correspond to that of a related noun—especially where, as here, the noun ("person") is given a special definition that departs from the common usage that rules of grammar reflect. The word "personal" has existed as a distinct word for centuries, and it does not mean "of or pertaining to" a corporation. AT&T's other contentions cannot salvage that core deficiency in its case and, in any event, do not withstand scrutiny. Moreover, the full term actually used in Exemption 7(C)—"personal privacy"—cannot plausibly be construed to refer to the interests of corporations and other non-human entities. And conferring such protection would require the courts to exercise extraordinary policymaking authority to define "personal privacy" rights of those entities without congressional benchmarks.

A. The Term "Personal Privacy" Encompasses Only The Privacy Interests Of Individuals

The government's opening brief demonstrates that the meaning of the term "personal" applies only to individual human beings and that, when the term is joined with "privacy," the resulting term "personal privacy" invokes background principles that further focus exclusively on individuals. Gov't Br. 17-20; see Project on Gov't Oversight (POGO) Amicus Br. 16-26 (explaining that corpora—large, historical databases of written English—demonstrate that "personal" has a specialized meaning that refers only to individuals, particularly when used with "privacy").

AT&T does not dispute that ordinary meaning of "personal" or of "personal privacy." AT&T instead contends (Br. 14-16) that although "dictionary definitions * * * define 'personal' with reference to an individual," Exemption 7(C) does not employ that "ordinary" meaning because Congress enacted a "statutory definition of 'person,'" which includes more than just individuals. AT&T argues (Br. 14, 16) that, by so defining the noun "person," "Congress necessarily defined the adjective form of that noun—'personal'—also to include corporations," because it is a "basic principle of grammar" that "the adjective form of a noun draws its meaning from the noun." In AT&T's view (Br. 14-15, 56) this purported "grammatical imperative" shows that, "in FOIA, 'personal' means 'of or pertaining to a particular' 'individual, partnership, corporation, association, or public or private organization,'" including a "foreign, state, and local government[]."

In announcing the existence of its "grammatical imperative," AT&T cites (Br. 14) only the decision below and a concurring opinion in an earlier Third Circuit case that (without supporting authority) criticized the majority in that case for *rejecting* the asserted imperative. *Delaware River Stevedores* v. *DiFidelto*, 440 F.3d 615, 623 (2006) (Fisher, J., concurring). AT&T's inability to identify further support underscores the basic flaw in its position: No such "grammatical imperative" exists. The term "personal" long ago evolved as its own word that pertains only to individuals, as illustrated by this Court's interpretation of the term. Background principles associated with the term "personal privacy" reinforce that conclusion. Indeed, AT&T is unable to identify a single instance in which "personal privacy" is used to refer to the interests of a corporation.

1. a. Certain forms of words, known as inflections or "inflected forms," are "predetermined by the system of grammar." 1 *Oxford English Dictionary* xxxii (2d ed. 1989) (*OED*). For instance, the plural forms of nouns; the third-person-present tense, past tense, and participles of verbs; and the comparative and superlative forms of adjectives carry the same core meaning as the basic noun, verb, or adjective and normally are formed (with some irregular exceptions) by adding standard suffixes. See *Webster's Third International Dictionary* 15a, 1160 (2002) (*Webster's*). But beyond such inflections, no "grammatical imperative" specifies the meaning of other words.

Some words, known as "derivatives," can also be formed by adding a suffix to an English root word. 1 *OED* xxxii. And while some derivatives take their meaning somewhat directly from their roots, others do not. "[M]ost words that have been used for any length of time in a language" acquire "a long and sometimes intricate series of significations, as the primitive sense has been gradually extended to include allied or associated ideas, or transferred boldly to figurative and analogical uses." *Id.* at xxviii. A derivative may therefore take its meaning from only one of the multiple meanings of its root, or it may reflect only one trait associated with one of those meanings. The phrase a "crabbed statutory interpretation," for instance, employs an adjective derived from the noun "crab," but "crabbed" does not pertain to a crustacean (crab), a machine for raising heavy weights (crab), a wild apple tree (crab), or a sour, ill-tempered person (crab). See *Webster's* 527 (noun's meanings); 3 *OED* 1092-1094. "Crabbed" invokes a figurative reference to certain traits associated with one of the root's multiple meanings—the tendency of crustaceans to tightly squeeze and "not easily let go what they have seized" and their "crooked or wayward gait," or an "association with the [crab] fruit, giving the notion of 'sour-tempered, morose, peevish, harsh.'" See *id.* at 1094. That illustration reflects a general principle: The relationship of the meanings of even "obviously formed derivatives" and their root words "is very often unpredictable and complex." 1 *OED* xxxii; cf. POGO Amicus Br. 6-9 & nn.8, 16 (explaining that etymology is often not a reliable guide to meaning).[1]

Thus, while AT&T's suggested linkage of adjective to noun might be used as one guide when interpreting the meaning of *newly* formed derivatives that do not already have an established meaning, it cannot determine the meaning of established words that have developed an accepted meaning over time.

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[1] A "critical legal distinction" similarly uses "critical" to mean important and does not refer to either an individual who pronounces a (often harsh) judgment (critic) or one skilled in evaluating literary or artistic works (critic).

That holds particularly true here, because "personal" is not derived from the English word "person." "Personal" appeared as its own English word by the late 1300s: It was adopted into English directly from the Old French *personal*, which was an adaptation of the Latin *personalis*, which was itself formed from the Latin *persona*. 11 *OED* 599; see 1 *OED* xxvii (explaining etymological entries). And in the centuries since its appearance in English, "personal" developed distinct meaning by following its own evolutionary path, diverging—sometimes materially—from the evolved meaning of its cousin, "person."[2]

As AT&T recognizes, the meaning of "person" has evolved in certain legal contexts to include both an individual and a "corporation (*artificial person*)." 11 *OED* 597 (definition 6.a). But the meaning of "personal" has not expanded from its reference to "the individual person or self" to refer to corporate entities. See *id.* at 599-600 (listing definitions for "personal"). If AT&T's "grammatical imperative" were correct, dictionaries would reflect a parallel expanded meaning for "personal" to include artificial persons. They do not.

This Court has accordingly interpreted the adjective "personal" to pertain only to an individual human being —not a corporation—notwithstanding that Congress's definition of the noun "person" includes a corporation. The Truth in Lending Act (TILA), 15 U.S.C. 1601 *et seq.*, defines "person" to mean an individual, "a corporation," or another public or private organization. 15 U.S.C. 1602(c) and (d). TILA also imposes certain requirements on "consumer" credit transactions, see, *e.g.*,

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[2] The word "person" was adopted into English (with multiple spelling variations over time) from the Old French *persone*, a phonetic descendent of the Latin *persona*. 11 *OED* 596.

15 U.S.C. 1666(a), which Congress defined to mean (as relevant here) credit transactions in which "the money, property, or services which are the subject of the transaction are primarily for *personal*, family, or household purposes." 15 U.S.C. 1602(h) (defining "consumer"; emphasis added); see *American Express Co.* v. *Koerner*, 452 U.S. 233, 240-241 (1981).

In *American Express*, this Court unanimously held that TILA did not apply where an individual (Koerner) serving as an "officer[] of [a] corporation" (the Koerner Co.) used his corporate credit card for the corporation's purposes. 452 U.S. at 237, 241-242 & n.9. The Court explained that TILA did not govern the resulting transaction because the transaction was primarily for the corporation's business purposes, not for "*personal*, family, household, or agricultural purposes." *Id.* at 241 n.9, 243-244 (emphasis added). Indeed, the Court concluded that "there can be no dispute" that TILA's relevant definition using the term "personal" was inapplicable, *id.* at 245, and found no other "possible interpretation" that might reach the corporate officer's use of his credit card for corporate purposes. *Id.* at 243-244; cf. *id.* at 238 (contrasting "personal expenses" with the corporation's "business-related expenses").

American Express illustrates that AT&T's broad "grammatical imperative," if adopted, would risk untold mischief within the United States Code. As of 2009, there were nearly two thousand provisions in the United States Code that use the term "personal," many of which appear in statutory contexts that either specifically define "person" or would be governed by the Dictionary Act's definition of "person" (1 U.S.C. 1). See, *e.g.*, 15 U.S.C. 1681a(b) and (d)(1)(A), 7006(1) and (8) ("personal * * * purposes"); 42 U.S.C. 7602(e) and (h) ("personal comfort and well-being"); 47 U.S.C. 153(2) and (32) ("personal aim") (renumbered in 2010 as Section 153(3) and (39)); cf. POGO Amicus Br. 30 & App. G (finding nearly 1700 references in 1992; listing illustrative phrases). Congress would have had no reason to expect that "personal" in such provisions would be construed beyond its standard, individual-focused meaning.

b. To support its position, AT&T cites (Br. 14 n.5) a handful of cases that supposedly define an adjective based on a "corresponding noun." But the only decision of this Court cited by AT&T simply construed the past-participle inflection (compiled) of a *verb* (compile) to interpret a participial phrase (which serves an adjective-like function). See *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 153-155 (1989) (interpreting "compiled for law enforcement purposes"). AT&T's other cases construe an adjective in context[3] or by adopting its ordinary meaning in dictionaries.[4] None transfers a noun's statutory definition to an adjective having its own established meaning or otherwise supports AT&T's noun-adjective "imperative."

AT&T identifies (Br. 19-20) only two uses of "personal" in conjunction with corporations in legal contexts, neither of which is relevant here. First, the term "personal jurisdiction" is simply a shorter, modern term of art for "jurisdiction *in personam*," that is, a *court*'s power to adjudicate and enter judgment in an "action *in personam*" as opposed to an "action *in rem*." See *Black's Law Dictionary* 33-34, 930 (9th ed. 2009) (defining "personal jurisdiction" and "action" *in personam* and *in rem*); *id.* at 862 (*in personam* means "against a person" in Latin); *Shaffer* v. *Heitner*, 433 U.S. 186, 199 (1977); see also *Burnham* v. *Superior Court*, 495 U.S. 604, 609, 616-618 (1990); Gov't Br. 46. The term "personal jurisdiction" thus evolved to reflect the nature of the associated court action, much like the evolution of "personal property." See 11 *OED* 600 (definition 6.b under "personal") ("personal property" refers to things historically "recoverable * * * by a personal action" (*i.e.*, an "*actio in personam*") as opposed to "things recoverable * * * by a real action" (an "*actio in rem*")); cf. AT&T Br. 41 (arguing that "personal property" is a term of art). Both "personal jurisdiction" and "personal property" are used in connection with corporations not because "personal" refers to corporations, but because corporations can own non-real property and be sued other than in actions *in rem*.

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[3] *Environmental Def. Fund, Inc* v. *EPA*, 82 F.3d 451, 462 n.16 (D.C. Cir. 1996) (concluding that "'vehicular' is best understood in this sentence as the adjectival form" of a "term used throughout the rulemaking," *i.e.*, "motor vehicle").

[4] *Knight* v. *Spencer*, 447 F.3d 6, 13 n.2 (1st Cir. 2006) ("The *Random House Dictionary of the English Language* (2nd ed.1987) defines prototypical as the adjectival form of 'prototype.'"); *Froehly* v. *T. M. Harton Co.*, 139 A. 727, 729-730 (Pa. 1927) (explaining that state statute uses "seasonal" in its "conventional sense" and that its meaning is "apparent" and reflected in a dictionary entry).

Second, AT&T cites to a late 19th-century decision that used the term "personal privilege" to describe a corporation's non-transferable tax exemption under state law. See *Mercantile Bank* v. *Tennessee*, 161 U.S. 161, 171 (1896). But *Mercantile Bank* did not use "personal" to reflect a special (state-law) definition of "person." It appears to have used "personal" simply to invoke by linguistic analogy an *individual*-specific meaning of that term in order to convey the non-transferable nature of the exemption. Cf. *Webster's* 1686 (defining "personal" to mean "exclusively for a given individual" (def. 6)); 11

OED 599 (def. 4). That use of "personal privilege" cannot support the weight of AT&T's case here.

2. When the term "personal" is added to "privacy" to form the term ("personal privacy") actually used in Exemption 7(C), that term invokes even more clearly background principles that apply exclusively to individuals. Gov't Br. 18-20. Indeed, it is well established that a "corporation * * * has no personal right of privacy." Restatement (Second) of Torts § 652I cmt. c, at 403 (1977) (Restatement).

AT&T contends (Br. 18-30) that "common legal usage" supports its view that corporations have "personal privacy." But its argument (Br. 18-19) that corporations are deemed "persons" in many legal contexts does not show that corporations are deemed to have "personal" traits, much less "personal privacy." And although FOIA's privacy exemptions can exceed the scope of common-law and constitutional protections (AT&T Br. 25-26), that is so only in respect to individuals, who are the only subjects of the privacy exemptions to begin with. The settled understanding that "personal privacy" refers only to individuals undoubtedly formed the backdrop for Congress's adoption of that phrase in Exemption 7(C). Gov't Br. 24.

AT&T asserts (Br. 26) that corporations possess common-law "privacy interests," but it fails to proffer any persuasive authority. AT&T cites the Restatement's recognition (in § 561) that a corporation may be defamed with respect to its "business reputation," Restatement § 561 cmt. b, at 159, but the Restatement makes clear that a "corporation is regarded as having no reputation in a *personal* sense." *Id.* App. § 561 reporter's note, at 335 (emphasis added). Moreover, defamation is premised on the tendency to harm reputation in the eyes of *others* (sometimes with consequent monetary harm), and it therefore is doctrinally distinct from an invasion of privacy, which focuses on the offense that would reasonably be felt by the injured *individual*. See *id.* § 559 & cmts. d-e, at 156-158; *id.* § 652E cmts. b-c, at 395-396.

AT&T fares no better by relying (Br. 26) on unsupported dicta in a non-precedential Ohio trial court decision (concerning the privacy of public officials) and on a decision of a California Court of Appeal suggesting that corporations enjoy "zones of privacy." The California decision, for instance, concerns only economic damages to a partnership, and the dicta that AT&T quotes is inconsistent with the established view that corporations lack the type of "personal" traits underlying the "right to privacy." See *Felsher* v. *University of Evansville*, 755 N.E.2d 589, 594-595 & n.10 (Ind. 2001) (discussing the California decision). The California Court of Appeal thus later concluded that a common-law "right to privacy * * * pertain[s] only to individuals," holding that corporations have no "viable cause of action for invasion of privacy" because they have "no 'feelings' which may be injured in the sense of the tort." *Ion Equip. Corp.* v. *Nelson*, 110 Cal. App. 3d 868, 878-879 (Cal. Ct. App. 1980).[5]

Although AT&T admits that corporations have no emotions, Br. 25, it argues that corporations can suffer harm to legitimate interests (like reputation) and that it is "common to speak of corporations * * * as being 'embarrassed,' 'harassed,' and 'stigmatized.'" Br. 42-43, 55; see *id.* at 42 (citing decisions indicating that Exemption 7(C) protects *individuals* from embarrassment, harassment, and reputational harm). Saying that "a corporation has been 'embarrassed,'" in AT&T's view, "is just another way of saying that its reputation has been damaged." *Id.* at 55. AT&T misses the point. The fact that corporations may be described metaphorically as experiencing emotions does not mean that they actually possess the emotional traits that animate "personal privacy" rights. See Gov't Br. 18-19. And legitimate property interests—even those that may involve rights to confidentiality—have not been labeled as interests in "personal privacy."

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[5] The academic commentary on which AT&T relies (Br. 26-27) acknowledges that "courts and others confronted with opportunities to consider corporate privacy rights have repeated the rule against them." Anita L. Allen, *Rethinking the Rule Against Corporate Privacy Rights*, 20 J. Marshall L. Rev. 607, 607 (1987); *id.* at 610-611. It lends AT&T no meaningful support.

3. In AT&T's view (Br. 20-25), a corporation's rights under the Fourth Amendment and Double Jeopardy Clause are "closely analogous" to the privacy interests protected by Exemption 7(C). That is incorrect.

a. Fourth Amendment rights are not materially similar to "personal privacy" rights under FOIA. This Court has recognized the Fourth Amendment rights of corporations in order to safeguard individuals who conduct business in the corporate form and restrain unreasonable government searches and seizures. Such rights serve a *derivative* function and do not protect "personal privacy" interests of corporations. Gov't Br. 47-49. But even if the Fourth Amendment is regarded as independently recognizing corporate interests, those interests would be inapposite here. Cf. *Associated Press* v. *United States Dep't of Def.*, 554 F.3d 274, 287 (2d Cir. 2009) (A "Fourth Amendment reasonable expectation of privacy is not the measure by which we assess [individuals'] personal privacy interest protected by FOIA."); *Judi-*

cial Watch, Inc. v. *Department of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004) (similar). The Fourth Amendment "protects individual privacy against certain kinds of *governmental* intrusion." *Katz* v. *United States*, 389 U.S. 347, 350 (1967) (emphasis added). It does not address the question in Exemption 7(C): Whether corporations have a personal privacy right to keep information (lawfully in government possession) from *non-federal* persons.

Moreover, the "reasonable expectation of privacy" relevant to Fourth Amendment analysis merely reflects what "society is prepared to recognize as 'reasonable'" for government searches and seizures. *Oliver* v. *United States*, 466 U.S. 170, 177-178 (1984) (quoting *Katz*, 389 U.S. at 360-361 (Harlan, J., concurring)). The Court accordingly has emphasized that Fourth Amendment protections cannot "be translated into a general constitutional 'right to privacy'" and "often have nothing to do with privacy at all." *Katz*, 389 U.S. at 350. The Fourth Amendment likewise does not furnish the measure of "personal privacy" under FOIA: A "person's *general* right to privacy" is "left largely to the law of the individual States," *id.* at 350-351 & n.6 (citing Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890)), and, as explained, corporations do not have "personal privacy" at common law. See pp. 10-11, *supra*. Cf. *California* v. *Greenwood*, 486 U.S. 35, 43-44 (1988) (Fourth Amendment protections are not defined by state law reflecting common-law privacy concepts).

b. AT&T's reliance (Br. 23-25) on the Double Jeopardy Clause is equally unavailing. This Court has indicated that the Double Jeopardy Clause protects against "embarrassment" and a continuing "anxiety" and "insecurity," but it has done so in referring to individuals, as AT&T's authorities confirm. See, *e.g.*, *Yeager* v. *United States*, 129 S. Ct. 2360, 2365-2366 (2009) (stating that the government should be prohibited from another attempt to "convict an individual" in part because of such emotional costs) (citation omitted); see also Gov't Br. 49 (discussing cases). To the extent the Double Jeopardy Clause prevents the government from improving its case against a corporate defendant by engaging in successive prosecutions, see *ibid.*, that hardly supports AT&T's view that it also protects corporate interests similar to "personal privacy" rights.

c. In fact, another component of the Fifth Amendment is to the contrary. Although the privilege against self-incrimination is not "a general protector of privacy," this Court has stated that one of its animating purposes is "protecting personal privacy." *Fisher* v. *United States*, 425 U.S. 391, 399, 401 (1976). As AT&T appears to admit, the Fifth Amendment gives only individuals—not corporations—the right to refuse to "produce private papers in their possession" when doing so would constitute an implicit, self-incriminatory act. *Id.* at 398, 414; see *United States* v. *Hubbell*, 530 U.S. 27, 36 & n.19 (2000); *Braswell* v. *United States*, 487 U.S. 99, 109-110 (1988); *id.* at 119-120 (Kennedy, J., dissenting) (Fifth Amendment privilege is an "explicit right of a natural person, protecting the realm of human thought and expression"). This Court has held that corporations are not entitled to such a right because it is a "purely personal" one and corporate records "embody no element of personal privacy." Gov't Br. 50 (citations omitted). Nothing suggests that the Court's conclusion in this regard is mistaken.

In the end, AT&T cannot identify any context—legal or otherwise—in which the term "personal" is used to mean "of or pertaining to" a corporation (Br. 14-15), much less a context in which a corporation is deemed to possess "personal privacy." Those failures are fatal to AT&T's contention that Exemption 7(C)'s text protects corporate interests in "personal privacy."

B. FOIA's Broader Structure Confirms That Exemption 7(C) Protects Only Individuals

FOIA's broader structure, including Exemption 6's parallel protection for "personal privacy" and Exemption 4's protection for information from corporations, confirms that Exemption 7(C) safeguards only individual interests. Gov't Br. 20-27.

1. AT&T argues (Br. 32-38) that Exemption 6 does not exclude corporations from its own "personal privacy" protections and therefore does not support the view that Exemption 7(C) does. AT&T emphasizes (Br. 32-34) Attorney General Clark's 1967 guidance regarding Exemption 6, which described the legislative history as explaining the Exemption's purpose as protecting "private and personal information" the release of which would constitute an unwarranted invasion of the "privacy of any person." U.S. Dep't of Justice, *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 36 (1967). The guidance then concluded that the statutory definition of "person" extends that protection to corporations. *Ibid.*; see *id.* at 19. The Attorney General misread the relevant legislative history, which referred to "individuals," see Gov't Br. 35 n.10, and did not have the benefit of subsequent commentary and judicial decisions explaining why Exemption 6 protections are limited to individu-

als, let alone the drafting history of the 1974 amendments enacting Exemption 7(C). See *id.* at 22-24, 27-34.

The 1967 analysis was regrettably flawed, but it was promptly discredited, never followed by any court, and appropriately corrected by Attorney General Levi in 1975 upon the enactment of Exemption 7(C). Gov't Br. 35 n.10; cf. 3 U.S. Dep't of Justice, Office of Information and Privacy, *FOIA Update* No. 4, at 5 (1982) <http://www.justice.gov/oip/foia_updates/Vol_III_4/page7.htm> ("FOIA's privacy exemptions provide personal privacy protection and cannot be invoked to protect the interests of a corporation."). Even today, AT&T and its amici are unable to identify even one FOIA case or commentator that has ever followed the 1967 guidance on this point or otherwise concluded that corporations have "personal privacy" under FOIA.[6] AT&T thus provides no persuasive reason for preferring the Attorney General's 1967 guidance over the Attorney General's subsequent views informed by the wisdom of history and precedent that specifically address FOIA's privacy exemptions.

AT&T dismisses (Br. 35-36) as "snippets" the legislative history and related decisions of this Court and other courts that repeatedly confirm that Exemption 6 protects only individuals. See Gov't Br. 20-24. Those sources are incompatible with AT&T's position: They explain why AT&T's textual analysis is flawed and demonstrate that the Exemption's balancing test must be grounded in the "individual's right of privacy," *United States Dep't of State* v. *Ray*, 502 U.S. 164, 175 (1991) (quoting holding in *Department of the Air Force* v. *Rose*, 425 U.S. 352, 372 (1976)). See Gov't Br. 20-24. AT&T also contends (Br. 38) that statements by Exemption 7(C)'s sponsor, Senator Hart, establishing that Exemption 7(C)'s "personal privacy" protections were drawn directly from Exemption 6, are unreliable. The contrary is true. A "sponsor's statement[s] to the full Senate carries considerable weight," *Corley* v. *United States*, 129 S. Ct. 1558, 1569 (2009), and this Court on two separate occasions has specifically relied on Senator Hart's statements in construing FOIA's 1974 amendments. See *FBI* v. *Abramson*, 456 U.S. 615, 626-627 nn.9, 11 (1982); *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 226-233 (1978).

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[6] The one FOIA decision AT&T cites (Br. 34) clearly concludes that the "private interest involved" was "the individual's right of privacy" under Exemption 6, *i.e.*, a "privacy interest" in the names and addresses of the companies that "extend[ed] to all such employees" who could face "harassment or violence" at those companies. *Judicial Watch, Inc.* v. *FDA*, 449 F.3d 141, 153 (D.C. Cir. 2006) (citation omitted); see Gov't Br. 39-40.

AT&T further contends (Br. 36-37) that even if Exemption 6 protects only individuals, it is consistent with Exemption 7(C)'s application to corporations because Exemption 6 applies to information in "personnel and medical files and similar files" that would not implicate corporate privacy interests. But Exemption 6's reference to such files reinforces the conclusion that "personal privacy" refers only to the interests of individuals—both in Exemption 6 itself and also in Exemption 7, which covers such information in a specific type of records (those compiled for law enforcement purposes).

2. AT&T takes issue (Br. 39-40) with the government's submission that Exemption 4's protection for trade secrets and confidential commercial and financial information of corporations further reinforces the conclusion that Exemption 7(C) does also not apply to corporations (see Gov't Br. 24-27), because Exemption 4, as

construed by the lower courts, does not protect corporate reputational interests. AT&T's argument confirms the error of its position. Exemption 4 shows that where Congress wanted FOIA to protect the types of interests a corporation has in keeping its affairs secret, it did so in express and carefully circumscribed terms. See Gov't Br. 24-27. Indeed, AT&T similarly claims (Br. 56) that Congress protected "the federal government's own privacy interests" in five other exemptions, but the carefully crafted text of those provisions similarly demonstrates that they protect specific interests, not a general "privacy" right. To the extent the information AT&T seeks to protect in this case falls outside of Exemption 4 or other Exemptions, that reflects Congress's judgment about the specific interests that warrant exemptions from FOIA, not that Congress intended to recognize an unprecedented notion that corporations have "personal privacy."

3. AT&T contends (Br. 30-31) that Exemption 7(C)'s "personal privacy" protection extends beyond individuals because Congress has used the term "individual" in other places. AT&T points to Congress's 1986 expansion of Exemption 7(F)'s protections for "life and physical safety" to "any individual" and to the appearance of "individual" with "privacy" in certain non-FOIA provisions that Congress enacted long after Exemption 7(C). Those distinct provisions provide no reliable basis for inferring Congress's intent years earlier regarding the very different text of Exemption 7(C). See *Doe* v. *Chao*, 540 U.S. 614, 626-627 (2004). In any event, AT&T fails to respond to our contention that if Congress had wanted to safeguard corporations and other specially defined "persons," it would have followed the more natural path it took in Exemptions 4 and 7(B), by enacting

text to protect the privacy "of any person." Gov't Br. 25, 41-42.

AT&T similarly disputes (Br. 30, 32) that Congress's use of "personal privacy" to protect only individuals in Exemption 7(C) is supported by its identical use of the term in the Privacy Act. See Gov't Br. 32-33. Although the Privacy Act expressly limits its protections to "individuals," Congress defined and used that term in the Privacy Act not because "personal privacy" otherwise would have extended protections to non-natural entities, but because Congress wanted to shield only a *subset* of the individuals whose personal privacy might be affected by government recordkeeping. See 5 U.S.C. 552a(a)(2) (defining "individual" to mean only United States citizens and lawful-permanent-resident aliens); H.R. Rep. No. 1416, 93d Cong., 2d Sess. 11 (1974); cf. Gov't Br. 32 n.7.

C. FOIA's Drafting History Reinforces The Conclusion That "Personal Privacy" Protects Only Individuals

Exemption 7(C)'s 1974 drafting history similarly reveals Congress's intent to protect only individuals from invasions of "privacy." Gov't Br. 27-34. AT&T argues (Br. 46-53) that this history does not address the question presented and that statutes can apply beyond their contemplated scope. Here, however, the statute's drafting history, which reveals a consistent emphasis on the privacy rights of individuals, strongly indicates that Exemption 7(C) protects only those interests.

Congress had little reason to explain specifically that corporate interests would not be protected, because the congressional debate addressed "personal privacy"—a term that has never been applied beyond individuals. Had Congress intended to protect corporations and foreign, state, and local governmental entities in Exemption 7(C), its choice of the term "personal privacy" would have been an entirely surprising way to do so. Congress "does not, one might say, hide elephants in mouseholes." *Whitman* v. *American Trucking Assns.*, 531 U.S. 457, 468 (2001). Exemption 7(C) is no exception.

D. AT&T's Position Is Unprecedented

AT&T does not appear to dispute that it has failed to offer "even a scintilla of evidence that Congress, the Executive, the Judiciary, or any private entity ever previously thought that corporations would have 'personal privacy' *under Exemption 7(C)*." Gov't Br. 41 (emphasis added). Although AT&T notes (Br. 53) that some elements of the Attorney General's 1967 guidance regarding Exemption 6 can be read to support its position, that guidance was promptly criticized (and never followed by the courts) long before Congress considered Exemption 7(C) in 1974. AT&T thus argues (Br. 49-53) that the entire 36-year corpus of court decisions, analysis, and commentary since Exemption 7(C)'s enactment should be disregarded as irrelevant.

For instance, AT&T criticizes (Br. 50) the Attorney General's 1975 FOIA Memorandum as making "no arguments at all, much less persuasive ones." That is incorrect. See Gov't Br. 34-35 & n.10. And although the memorandum states that "personal privacy" does not "seem" to apply to corporations, that caution was warranted because of the more complicated "personal privacy" issues involving certain closely held corporations. See Gov't Br. 36 n.11.

AT&T ignores the treatises by scholars confirming that Exemption 7(C)'s "personal privacy" applies only to individuals. Gov't Br. 38-39. And while AT&T correctly observes (Br. 53) that then-Professor Scalia's 1981 testimony did not expressly mention "Exemption 7(C)" in such terms, that testimony unmistakably states that corporations have no "privacy" protections recognized by the 1974 Amendments to Exemption 7, of which Exemption 7(C)'s "personal privacy" provisions are a part. See Gov't Br. 39.

Finally, AT&T asserts (Br. 50-52) that the decisions of this Court and the courts of appeals are unhelpful because their conclusions that Exemptions 6 and 7(C) protect the same privacy interests were not made in cases involving "corporate privacy" and that other decisions involve dicta. In fact, those decisions reflect what the courts have long recognized, based on FOIA's text and drafting history: that FOIA's privacy balance is and has always been based on an *individual*'s interest in personal privacy. Gov't Br. 35-37.

E. AT&T's Interpretation Would Produce Anomalous Results

AT&T's contention that the term "personal privacy" in Exemption 7(C) protects corporate interests would produce highly anomalous results. In practice, it would be exceedingly difficult for federal agencies and courts to identify the parameters of a corporation's or a foreign or domestic government's so-called "personal privacy" interests because no relevant legal principles provide objective benchmarks for defining any such interests. Had Congress intended to authorize courts to engage in such an unbounded exercise of policy-making authority in deciding whether institutions have a valid "personal privacy" interest in withholding information from public scrutiny, it surely would have given some indication of its intent and supplied some framework for doing so. Gov't Br. 50-54.

AT&T errs in arguing (Br. 54-56) that Fourth Amendment and common-law defamation principles would offer the necessary guidance. Fourth Amendment principles largely turn on the nature of the physical locations in question and the justification for a government search or seizure, and would be of little help in assessing the disclosure of records already in the government's possession, based on the content of those records. Fourth Amendment principles do not reflect a general interest in keeping government information from public disclosure, cannot be translated into a general right to privacy, and may have little to do with privacy at all. See pp. 12-13, *supra*. Similarly, defamation for corporations concerns potential harms to a corporation's business reputation resulting from the negative reaction of others to *untruthful* factual statements (where the statement's maker knew of its falsity or acted negligently or recklessly in failing to ascertain its falsity). See pp. 10-11, *supra*; Restatement §§ 566, 580B, 581A. Requiring agencies and courts to determine whether the factual statements in each responsive agency record are true or false would ultimately impose an unmanageable burden on the FOIA process to identify the scope of a property (not privacy) interest.

Significantly, AT&T fails altogether to identify any relevant "personal privacy" predicates for governmental entities. It asserts (Br. 56) that Congress protected the federal government's "privacy interests" in five carefully delineated exemptions (concerning such matters as classified information and internal personnel rules and practices), but those provisions do not refer to "privacy" and cannot plausibly be deemed to concern "personal privacy." The fact that Congress enacted those specific exemptions for the federal government does not suggest that it would have intended analogous outcomes for, say, foreign governments. And lacking such guidance, agencies and the courts would be left to define "personal privacy" based on policy considerations without any direction from Congress.

Congress certainly did not intend that extraordinary result. Exemption 7(C) has never been applied to protect corporate and foreign, state, and local government interests.[7] Nothing suggests that Congress intended to confer such unprecedented and expansive protections to institutions under the rubric of "personal privacy."

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

JANUARY 2011

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[7] AT&T's concern (Br. 43) that protecting only individual interests will "chill" corporate cooperation with federal law-enforcement agencies is misplaced. There is no reason to believe that such chill will result from reaffirming the scope of Exemption 7(C) that has governed the administration of FOIA requests since its enactment in 1974.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED

DEC 16 2010

OFFICE OF THE CLERK

No. 09-1279

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Petitioners,

v.

AT&T INC., *et al.*,
Respondents.

**On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit**

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INTEREST OF *AMICUS CURIAE*[1]

Business Roundtable is an association of chief executive officers of leading U.S. companies with nearly $6 trillion in annual revenues and more than 12 million employees. Member companies comprise nearly a third of the total value of the U.S. stock markets and more than 60 percent of all corporate income taxes paid to the federal government.

As the senior leaders of many of the country's largest and most responsible corporate citizens, Business Roundtable members have a strong interest in the proper construction of Exemption 7(C). Where a business misbehaves, its right to privacy should be no greater than any other person's. However, where responsible corporate citizens commit themselves to ethical conduct, they deserve a reasonable opportunity to protect their good reputations against indiscriminate disclosure of information collected by the government.

Business Roundtable will explain how the Freedom of Information Act allows federal agencies to exercise sound judgment to help prevent the reputation of any person from being unduly or unfairly tarnished beyond any official sanction the relevant agency has determined to impose pursuant to due process.

[1] Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus*, its members, or its counsel made a monetary contribution to the preparation of this brief. Pursuant to Supreme Court Rule 37.3(a), *amicus* certifies that counsel of record for both parties have consented to its filing in letters on file with the Clerk's office submitted herewith.

SUMMARY OF ARGUMENT

As Respondent AT&T demonstrates, FOIA's plain text includes corporations within the protections of Exemption 7(C). Petitioners' contrary construction would be inconsistent with FOIA's purpose, unfaithful to the text and intent of Exemption 7(C), and oblivious to the judiciary's existing treatment of confidential commercial information under Exemption 4.

First, Congress crafted FOIA to protect the public's need for open government, and to balance disclosure of government operations with legitimate public and private confidentiality concerns. See S. Rep. No. 89-813, at 3, 6 (1965). FOIA does not favor the indiscriminate release of private information held by the government that would result in unwarranted injury. Yet, unless the decision below is upheld, corporations will be deprived of any opportunity to assert the confidentiality of large swaths of sensitive, non-public information obtained by the government in connection with law enforcement proceedings.

This would open corporations to public scrutiny that Congress did not intend, is not properly imposed by the relevant federal agency, and is neither necessary nor appropriate to advance the public interest in open government. In contrast, upholding the Third Circuit will merely empower federal agencies to be responsible stewards of the vast troves of confidential data they collect.

Second, Exemption 7(C) covers a broad range of sensitive, confidential information, which a corporation, like an individual, would not normally make public for any number of reasons including the desire to defend one's reputation for good citizenship and integrity, preserve the ability to engage in internal self-criticism, avoid undue embarrassment or being unfairly judged, and reduce the potential for others to be misled.

Corporations are considered to possess and be accountable for distinctly personal qualities such as morality, mental states, culture and ability to learn. Corporations are distinct legal actors with constitutional and other privacy rights. Businesses and other associations work hard to earn positive reputations with their customers and employees. As Business Roundtable's *Principles of Corporate Governance* (Apr. 2010) instruct, the "board of directors, the CEO and senior management should set a 'tone at the top' that establishes a culture of legal compliance and integrity." *Id.* at 2.[2] Indeed,

> [c]orporations have obligations to be good citizens of the local, national and international communities in which they do business. Failure to meet these obligations can result in damage to the corporation, both in immediate economic terms and in longer-term reputational value.

Id. at 34. See also *Brown & Williamson Tobacco Corp.* v. *Jacobson*, 713 F.2d 262, 269 (7th Cir. 1983) (noting that a corporation "can have a reputation for adhering to the moral standards of the community in which it sells its products."). Exemption 7(C) protects the ability of businesses to defend their well-earned reputations.

Third, while Exemption 4 also concerns sensitive and confidential information that is distinctly "commercial" in nature, it has been construed narrowly by the lower courts. This exemption does not protect the full range of valuable confidential information, such as information that would injure a corporation's reputation with customers, employees, stockholders or even government agencies. Instead, such interests are properly covered under Exemption 7(C).

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[2] Available at http.//businessroundtable.org/studies-and-reports/2010-principles-of-corporate-governance/.

Fourth, FOIA's exemptions work together to ensure the statute's balance is met. In accordance with longstanding judicial construction, and Department of Justice FOIA guidance, commercial material covered by Exemption 4 *must* be withheld—agencies have no discretion to release such information. See Dep't of Justice, *Guide to the Freedom of Information Act* 355-56 (2009) (*FOIA Guide*). Confidential material covered by Exemption 7(C), on the other hand, *may* be withheld, subject to the agency's balancing of the asserted privacy interest against the interest in public disclosure. This discretionary approach to protecting information that is confidential, but does not involve actual trade secrets, or the like, allows agencies to weigh FOIA's conflicting goals and avoid the informational clamp-down that Petitioners and their *amici* fear.

Petitioner's view that any private corporate information beyond the parameters of Exemption 4 is subject to unmitigated—and potentially irresponsible—public disclosure is not how Congress conceived FOIA.

Affirming the Third Circuit will entail only a *de minimis* additional burden on agencies, which are in any event required to comply with the dictates of FOIA. See 5 U.S.C. §552(a)(3); *EPA* v. *Mink*, 410 U.S. 73, 79 (1973) ("[FOIA] eliminate[d] the [previously applicable] 'properly and directly concerned' test of access, stating repeatedly that official information *shall* be made available 'to the public,' 'for public inspection.'") (emphasis added). Petitioners' alternative—the mandatory disclosure of a corporation's private information without any inquiry into its nature or the effect of its disclosure—is not faithful to FOIA and would make poor public policy.

Affirmance will allow agencies to provide responsible protection for the personal privacy of corporations, and other associational persons, and is properly respectful of the increasing sensitivity our law recognizes for privacy interests generally.

ARGUMENT

By its plain terms, FOIA Exemption 7(C) extends to corporations. 5 U.S.C. §551(2) (defining "person" to include corporations). Exemption 7(C) applies to "records or information compiled for law enforcement purposes" insofar as disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *Id.* §552(b)(7)(C). As Petitioners acknowledge, the word "personal" means, *inter alia*, "'of or relating to a particular *person*.'" Pet. Br. 17-18 (quoting *Webster's Third New International Dictionary* 1686 (1961)) (emphasis added). Because "personal" is the adjectival form of the defined term "person," Exemption 7(C) expressly affords corporations the opportunity to invoke "personal privacy" interests under FOIA.

Petitioners, Respondent Comptel, and their *amici* argue that corporations have only "commercial" interests, which, they claim, are fully protected under Exemption 4. See Pet. Br. 24-27. The necessary consequence of their argument is that corporate data that is *not* covered by Exemption 4 is fair game for indiscriminate public disclosure—no matter how sensitive, non-public or confidential.

This counter-textual argument must be rejected. FOIA does not favor such indiscriminate disclosure. Instead, it promotes the public's interest in transparent government while carefully avoiding undue intrusion on legitimate privacy interests.

I. FOIA BALANCES TRANSPARENT GOVERNMENT WITH LEGITIMATE PRIVACY INTERESTS.

The question before the Court is a narrow one whether a corporation may even ask an agency to weigh a personal privacy interest under Exemption 7(C). Petitioners, Respondent Comptel, and their *amici* assert that Congress exclusively addressed corporate privacy interests in Exemption 4, which protects trade secrets, commercial or financial data. See Pet. Br. 24-27. Corporate information *not* covered by Exemption 4, they argue, is subject to public disclosure without any constraint or careful consideration. This extreme view is unsupportable under FOIA.

A. FOIA Encourages Government Transparency, Not The Disclosure Of Private, Confidential Information.

Congress enacted FOIA to allow citizens to inform themselves about the activities of their government. "[T]he basic purpose of [FOIA is] to open *agency* action to the light of public scrutiny." *Dep't of the Air Force* v. *Rose*, 425 U.S. 352, 372 (1976) (emphasis added) (quotations omitted). FOIA's "basic policy of full agency disclosure unless information is exempted under clearly delineated statutory language [supports] citizens' right to be informed about what their *government* is up to." *U.S. Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S.

749, 773 (1989) (emphasis added) (quotations omitted).

FOIA was not conceived as a blunt instrument to force public whatever private information comes into the government's possession. As this Court has explained, "FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed." *Reporters Comm.*, 489 U.S. at 774.

This is particularly true for law enforcement records.

> [J]ust as the identity of the individuals given public relief or involved in tax matters is irrelevant to the public's understanding of the Government's operation, so too is the identity of individuals who are the subjects of rap sheets irrelevant to the public's understanding of the system of law enforcement.

Id. at 766 n.18. In short, FOIA does not provide a crowbar to anyone wishing to uncover private information that finds its way into a law enforcement file.

This case well illustrates the point, as the party seeking disclosure represents Respondent AT&T's commercial competitors. See Pet. Br. 7. Indeed, Comptel's single-sentence FOIA demand simply requested release of the FCC's investigative file. *Id.* It would strain credulity to believe that such a request was more concerned about scrutinizing the government than the government's target.[3] To the extent that such a request could serve a dual purpose, Congress properly charged agencies to exercise their best judgment with regard to disclosure under Exemption 7(C). See *ante* at 9-10.

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[3] Petitioner's *amici* betray a signal misapprehension of FOIA's purpose of shedding light on *governmental* activity. For

B. FOIA's Exceptions Promote Legitimate Public And Private Privacy Needs.

FOIA requires each agency to make public a broad array of materials. See 5 U.S.C. §552(a)(2)&(3). This advances "FOIA's central purpose [of] ensur[ing] that the *Government's* activities be opened to the sharp eye of public scrutiny." *Reporters Comm.*, 489 U.S. at 774. FOIA's exemptions temper this disclosure mandate by accommodating legitimate governmental and non-governmental confidentiality concerns. See 5 U.S.C. §552(b). In enacting the exemptions, "Congress tried to craft the FOIA exemptions to prevent harm to the public—whether the risk of that harm stems from criminals or investors who would trade on confidential information regarding a company or a bank."[4]

FOIA's exemptions "set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed." *Mink*, 410 U.S. at 79. They protect discrete classes of information and complement each other to accommodate reasonable confidentiality interests. See *id.* at 80 (quoting the Senate Committee's

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example, the Reporters' Committee brief argues that to affirm would deprive it of its "constitutionally protected 'watchdog' function" overseeing "the *corporate power structure*." Br. of Reporters Comm. 3, 18 (emphasis added). That function may be a perfectly valid one for the Reporter's Committee, but it is not the purpose FOIA is designed to advance.

[4] Alan Charles Raul, *Privacy and the Digital State: Balancing Public Information and Personal Privacy* 27 (2002).

explanation that "it was not 'an easy task to balance the opposing interests, but it is not an impossible one either.... Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.'").

Congress provided numerous protections for private sector interests. Exemption 4 covers privileged and confidential trade secrets, commercial, and financial data. Exemption 6 regards medical, personnel, and related files. Exemption 7(B) covers law enforcement information that may hinder a fair trial. Exemption 7(C) protects against invasions of personal privacy. Exemption 7(F) protects life or physical safety. And Exemption 8 shields data gathered by financial institution examiners.[5]

Some constraints on disclosure are mandatory. In particular, confidential commercial materials, and financial institution data covered by Exemptions 4 and 8 are, in general, protected absolutely. See *FOIA Guide* 355-56, 360-61 ("[A] determination by an agency that information falls within Exemption 4 is 'tantamount' to a decision that it cannot be released.").[6] Others are discretionary and subject to a balancing test. For example, Exemptions 7(A) and

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[5] Exemption 3 prohibits disclosure of materials expressly protected by other laws, such as trade secrets and grand jury materials.

[6] *See, e.g.*, *Bartholdi Cable Co.* v. *FCC*, 114 F.3d 274, 281 (D.C. Cir. 1997) (noting that agencies are generally "precluded from releasing" information protected by Exemption 4 due to provisions of Trade Secrets Act). The FCC has acknowledged as much, recognizing that the "Trade Secrets Act...prohibits unauthorized disclosure of all data protected by Exemption 4." *See* FCC, *FOIA Annual Report* 9 (2007), *available at* http://www.fcc.gov/foia/2007foiareport.pdf.

7(C) entrust disclosure to agency discretion. *Id.* at 523-58, 591-95 (discussing agency balancing responsibility). Petitioners argue, however, that corporate confidential information that is not covered by Exemption 4 is categorically and absolutely subject to disclosure. There is no basis in law for that irresponsible position.

II. FOIA EXEMPTION 7(C) PROTECTS INDIVIDUAL AND ASSOCIATIONAL PRIVACY INTERESTS.

Exemption 7(C) protects information intended to be kept private, the release of which would result in substantial reputational or other injury. Many of the interests protected under Exemption 7(C) for individuals are shared by corporations and other persons. Moreover, the common law tradition to which this Court looks to define personal privacy recognizes such interests in corporations. Excluding corporations from Exemption 7(C)'s protections would thus be arbitrary.

A. Exemption 7(C) Regards Information Whose Release May Invade Personal Privacy.

Exemption 7(C) covers information whose disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(7)(C). This exemption casts a wide net. "[T]he concept of personal privacy under Exemption 7(C) is not some limited or 'cramped notion' of that idea." *Nat'l Archives & Record Admin.* v. *Favish*, 541 U.S. 157, 165 (2004) (quoting *Reporters Comm.*, 489 U.S. at 763). It is not limited to the sort of privacy implicated in this Court's due process jurisprudence. See *Reporters Comm.*, 489 U.S. at 762. Instead, it protects the "interest in avoiding disclosure of personal matters" generally, *id.*, and includes freedom from the sorts of "public intrusion[] long deemed impermissible under the common law and in our cultural traditions," *Favish*, 541 U.S. at 167.

Congress purposefully drew Exemption 7(C) broadly, requiring only a reasonable expectation of an unwarranted invasion of personal privacy. 5 U.S.C. §552(b)(7)(C). As the Court specifically explained in *Reporter's Committee*, Exemption 7(C) was "the product of a specific amendment" and was intended to be more broad than, for example, the protection for "personal privacy" offered in Exemption 6. 489 U.S. at 756.

Indeed, Exemption 7(C) privacy is not limited to the person the information concerns, but includes the privacy of others who may be impacted by its release. *Favish*, 541 U.S. at 165-66. Hence, in *Favish*, the Court held that family members could invoke Exemption 7(C) to prevent the release of photographs of a dead relative because the release would invade *their* privacy. *Id.* at 167.

Broad protection of privacy is particularly appropriate with regard to information compiled for law enforcement. As the D.C. Circuit has recognized, Exemption 7(C) "recognizes the stigma potentially associated with law enforcement investigations." *Bast* v. *U.S. Dep't of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981). Suspects in a law enforcement investigation "have the most obvious privacy interest in not having their identities revealed." *McDonnell* v. *United States*, 4 F.3d 1227, 1255 (3d Cir. 1993) (citations omitted).

For example, Exemption 7(C) protects the privacy interest of targets and subjects who are never indicted or prosecuted:

> The decision to prosecute an individual for a crime is attended by consequences beyond the risk of conviction. When the individual or the crime has attracted general notoriety, institution of proceedings typically provokes widespread speculation attended by at least some damage to the reputation of the individual involved. Common experience teaches that this speculation is not quieted when, and if, a jury finally announces its verdict. Typically, the decision not to prosecute insulates individuals who have been investigated but not charged from this rather significant intrusion into their lives.

Fund for Constitutional Gov't v. *Nat'l Archives & Records Serv.*, 656 F.2d 856, 864 (D.C. Cir. 1981).

Where an agency, after investigation, elects not to proceed publicly on some issue, FOIA does not—and should not—stoke a subsequent, further trial in the court of public opinion. Indeed, "[a] FOIA disclosure that would announce to the world that certain individuals were targets of an FBI investigation, albeit never prosecuted, may make those persons the subjects of rumor and innuendo, possibly resulting in serious damage to their reputations." *Stern* v. *FBI*, 737 F.2d 84, 92 (D.C. Cir. 1984) (internal quotation marks and omission omitted). The Exemption has likewise been held to protect:

- interviewees and witnesses that "have a substantial privacy interest because disclosure may result in embarrassment and harassment";[7]

- "the disclosure of the identity of individuals where such disclosure would be likely to cause harassment or embarrassment because of the person's cooperation in the investigation or the nature of the information disclosed by that individual";[8]
- those that assist law enforcement and who therefore face a "fear of harassment" and "'stigma' sometimes attached to such cooperation with the authorities";[9]
- attendees at a meeting "that had reportedly attracted the attention of law enforcement officials" who therefore have a privacy interest in "not being connected in any way with a criminal investigation."[10]

Significantly, Exemption 7(C) recognizes the possible shortcomings lurking in law enforcement records. Information may be incomplete, irrelevant, misleading, disproportionate, or simply wrong.

> Law enforcement documents...often contain information about persons interviewed as witnesses or initial suspects but whose link to the official inquiry may be the result of mere happenstance. There is special reason, therefore, to give protection to this intimate personal data,

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[7] *McDonnell*, 4 F.3d at 1255.

[8] *Cuccaro* v. *Sec'y of Labor*, 770 F.2d 355, 359 (3d Cir. 1985).

[9] *Holy Spirit Ass'n for Unification* v. *FBI*, 683 F.2d 562, 565 (D.C. Cir. 1982) (per curiam) (MacKinnon, J. concurring).

[10] *Computer Professionals for Social Responsibility* v. *U.S. Secret Serv.*, 72 F.3d 897, 904 (D.C. Cir. 1996).

> to which the public does not have a general right of access in the ordinary course.

Favish, 541 U.S. at 166. Records "are sometimes incorrect or incomplete and sometimes contain information about other persons with similar names." *Reporters Comm.*, 489 U.S. at 752.

For these reasons, Exemption 7(C) provides a broad privacy safeguard to protect reputations, avoid embarrassment or harassment, and prevent damaging information from being made irretrievably and irresponsibly public—unless there is a sufficient public interest in doing so.

B. Corporations Possess Personal Privacy Interests Of The Sort Protected Under Exemption 7(C).

Associational persons enjoy the legal and traditional privacy interests protected by Exemption 7(C) no less than individuals. See *Favish*, 541 U.S. at 167 (Exemption 7(C) protects against the sorts of "intrusion long deemed impermissible under the common law and in our cultural traditions").

1. As an initial matter, there is nothing remarkable in the proposition that corporations have personal privacy rights and interests. To the contrary, corporations have long been recognized as legal persons. See *Trs. of Dartmouth Coll.* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819). A corporation

> is, in short, an artificial person, existing in contemplation of law, and endowed with certain powers and franchises which, though they must be exercised through the medium of its natural members, are yet considered as subsisting in the corporation itself, as distinctly as if it were a real personage.

Id. at 667 (Story, J. concurring). The corporate form allows "a perpetual succession of many persons [to be] considered as the same, and *[to] act as a single individual.*" *Id.* at 636 (emphasis added). Indeed, associations play an essential role in American democracy. As de Tocqueville observed nearly 200 years ago, "[a]mong democratic peoples associations must take the place of the powerful private persons whom equality of conditions has eliminated." Alexis de Tocqueville, *Democracy in America* 516 (Lawrence trans., Mayer ed., HarperPerennial 1988) (1835, 1840).[11]

Thus, corporations may invoke the Contracts Clause, see *Trs. Of Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 650, are persons within the Fifth and Fourteenth Amendments, see *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 780 n.15 (1978); *Grosjean* v. *Am. Press Co.*, 297 U.S. 233, 244 (1936), are protected against double jeopardy, *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977), and are protected from the taking of property without just compensation, *Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104 (1978).

Most relevant for present purposes, corporate persons have constitutional privacy interests. Corporations, for example, are protected against unreasonable searches and seizures. See *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 311-12 (1978); *See* v. *City of Seattle*, 387 U.S. 541 (1967); *Camara* v. *Mun. Court*, 387 U.S. 523, 528-29 (1967). See also *Dow Chem. Co.* v. *United States*, 476 U.S. 227, 237 (1986)

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[11] *See also* de Tocqueville, *supra* at 513 ("In every case, at the head of any new undertaking, where in France you would find the government or in England some territorial magnate, in the United States you are sure to find an association.").

("Any actual physical entry by EPA into any enclosed [manufacturing plant] would raise significantly different questions, because '[t]he businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property.'") (quoting *See*, 387 U.S. at 543).

Corporations may also invoke First Amendment associational privacy rights. Thus, in *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 458-60 (1958), the NAACP could not be compelled to disclose its general membership lists. See also *Calif. Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 97-98 (1974) (Marshall, J. dissenting) (citing additional authorities).

Corporations also enjoy First Amendment speech rights. The government may not deprive a corporation of its right to speak based solely on its corporate form. See *Consol. Edison Co. of N.Y.* v. *Pub. Serv. Comm'n*, 447 U.S. 530, 533-34 (1980); *Bellotti*, 435 U.S. at 778-86. As this Court explained last term, "'[c]orporations and other associations, *like individuals*, contribute to the "discussion, debate, and the dissemination of information and ideas" that the First Amendment seeks to foster.'" *Citizens United* v. *FEC*, 130 S.Ct. 876, 900 (2010) (quoting *Pac. Gas & Elec. Co.* v. *Pub. Utils. Comm'n*, 475 U.S. 1, 8 (1986) (plurality opinion) (quoting *Bellotti*, 435 U.S., at 783)) (emphasis added).

And, apropos of this case, corporations enjoy not only the right to speak, but the right to decline to speak. See *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974) (invalidating a "right of reply" statute requiring newspapers to publish, free-of-charge, rebuttals to political editorials); *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 654 (1994) ("[B]y affording mandatory access to speakers with which the newspaper disagreed, [the *Tornillo* law] induced the newspaper to respond to the candidates' replies when it might have preferred to remain silent"); *PG&E*, 475 U.S. at 11 (invalidating rule requiring utility to distribute newsletter critical of ratemaking practices).

2. Petitioners and their *amici* dismiss these interests as merely incidental. Fourth Amendment rights, they argue, are "derivative of the individual rights of those who collectively own and operate corporations." Pet. Br. 47 (citing *Hale* v. *Henkel*, 201 U.S. 43, 76 (1906)). But that is a meaningless distinction. Corporations are "many persons... act[ing] as a single individual," *Trs. of Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 636, but the resulting legal entity has rights *not* held by those individuals, *id.* at 667 (Story, J. concurring).[12]

Petitioners' *amici* similarly dismiss the Court's associational privacy cases as intended only "to protect an *individual's* freedom to join with other individuals." Br. of Free Press 19. But this ignores what the Court recognized in *NAACP* v. *Alabama*, namely that members' associational rights could *only* be protected through the association because "[t]o require that [they] be claimed by the members themselves would result in nullification of the right at the very moment of its assertion." 357 U.S. at 459-60. Therefore, the NAACP was "the appropriate party to assert [the] rights, because it and its members are in every practical sense identical." *Id.*

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[12] Thus, absent special circumstance, employees lack standing to assert the corporation's Fourth Amendment rights on their own behalf, but must instead demonstrate a violation of their own individual expectation of privacy. *See, e.g.*, *Mancusi* v. *DeForte*, 392 U.S. 364, 366-70 (1968); *United States* v. *Mohney*, 949 F.2d 1397, 1403-04 (6th Cir. 1991).

As these decisions demonstrate, corporations have long held precisely the sort of privacy interests protected under Exemption 7(C). It is not much of a refutation to argue that corporate rights are different. See Pet. Br. at 48. Of course they are. As a legal creation, a corporation "possesses only those properties which the charter of its creation confers upon it." *Trs. of Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 636. But, to the extent that they have *some* privacy interests, nothing in Exemption 7(C), or anyplace else in FOIA, excludes corporations or other associations from the class of "persons" whose privacy interests it protects.

Indeed, Exemption 7(C) accommodates different types and degrees of privacy interest. In *Favish*, the Court noted that while membership in a family—an association of sorts—allowed relatives to invoke Exemption 7(C) privacy interests, "[t]his does not mean that the family is in the same position as the individual who is the subject of the disclosure." 541 U.S. at 167. Thus, the extent to which a particular association can assert a particular privacy interest is a question for the agency to decide in the first instance, on a case-by-case basis.

3. Even Petitioners and their *amici* agree that corporations certainly have privacy interests in their confidential commercial information. To the extent that such information meets the criteria of Exemption 4, it is categorically protected from disclosure. However, corporations also have more general privacy concerns that are not necessarily distinctly "commercial" in nature. Protection of such confidential information is subject to discretionary—not categorical—protection under Exemption 7(C).

Commercial confidentiality easily covers trade secrets, product designs, formulas, manufacturing processes, research and development, and the like, but business associations also closely protect the privacy of information that courts have not readily characterized as commercial in nature. For example, businesses value their goodwill and reputation, and can suffer tremendously when these are injured due to the indiscriminate disclosure of sensitive, non-public information that could—without any due process—undermine their standing with customers, employees, and the public.[13]

As the Seventh Circuit explained:

> [a] corporation cannot have a reputation for chastity but it can have a reputation for adhering to the moral standards of the community in which it sells its products.

Jacobson, 713 F.2d at 269; see *id.* (noting that "the standards for proof of defamation are [no] different for corporations than for other plaintiffs. The cases treat corporate plaintiffs just like individuals.").

Individuals and associations share an interest in protecting their reputations. To that end, a corporation has a potentially protectable interest in keeping private the fact that it was implicated in a law enforcement investigation, whether as a witness, a subject or a target. For example, the corporate respondent in *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), opposed the disclosure of grand jury investigative materials to Department of Justice lawyers generally. Agreeing, the Court explained that "[g]rand jury secrecy...is 'as important for the protection of the innocent as for the pursuit of the guilty.'" *Id.* at 424-25 (quoting *United States* v. *Johnson*, 319 U. S. 503, 513 (1943)).

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[13] The threats to corporate reputational interests are all the more heightened in today's internet society. *See* Andy Greenberg, *WikiLeaks' Julian Assange Wants to Spill Your Corporate Secrets*, Forbes, Dec. 20, 2010, at 71, 74-76.

Indeed, a business may reasonably desire to keep confidential how it was referenced in an investigative file, the contents of which are hardly always reliable. *Favish*, 541 U.S. at 166; *Reporters Comm.*, 489 U.S. at 752. A business, like any person, has a compelling privacy interest in keeping confidential the fact that they were investigated of some wrongdoing, even where the accusations were reviewed and thoroughly discredited or resolved by the government short of a determination of liability on all allegations.

Such interests are routinely protected for all persons under FOIA Exemption 7(C).[14]

4. In assessing a corporation's interest in personal privacy, it is important to note that, contrary to

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[14] Disenfranchising corporations from Exemption 7(C) would deny its protections not only to large corporations such as Respondent AT&T, but also every other type of business. The vast majority of employers in the United States are small businesses, *see* SBA, Office of Advocacy, *Frequently Asked Questions* (Sept. 2010), *available at* http://www.sba.gov/advo/stats/sbfaq.pdf, which depend heavily on their good reputation in the community. Such a ruling would also exclude not-for-profit and religious corporations, whose interests are less frequently covered by Exemption 4, and quite similar to the sort of personal privacy interests covered by Exemption 7(C). *See, e.g., Church of Scientology Flag Serv.* v. *City of Clearwater*, 2 F.3d 1514, 1535-47 (11th Cir. 1993) (striking down city registration ordinance on establishment and free exercise grounds); *Council on Am.-Islamic Relations* v. *Gaubatz*, 667 F. Supp. 2d 67, 77 (D.D.C. 2009) ("Disclosure of a non-profit corporation's confidential donor list, like disclosure of a for-profit corporation's customer list, might well lead to a loss of trust and goodwill if donors begin to feel that their personal information is not safe.") (quotations omitted).

Petitioners' argument, Pet. Br. 18, corporations are distinctly considered to have "states of mind" just like individuals. As a matter of law, corporations are routinely judged with regard to their state of mind with respect to the applicable *mens rea* requirement. See, *e.g.*, *Safeco Ins. Co.* v. *Burr*, 127 S. Ct. 2201, 2215-16 (2007) (assessing the standard of "willful" conduct under the Fair Credit Reporting Act); *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 706 (2005) (reversing conviction of corporation where "the jury instructions at issue simply failed to convey the requisite consciousness of wrongdoing").[15] A corporate defendant cannot avoid liability on the basis that, as merely a "legal person," it cannot have a "guilty mind." Cf. *United States* v. *Sci. Applications Int'l Corp.*, __ F.3d __, 2010 WL 4909467, at *16 (D.C. Cir. Dec. 3, 2010) (noting that the "standard for knowledge under the [False Claims Act] is [not] lower for corporate defendants").

Likewise, associations can be embarrassed, harassed, or stigmatized. Cf. Pet. Br. 53. Officials do not hesitate to ascribe emotional capacity to corporations. See, *e.g.*, Letter of Representative Michael Michaud (Mar. 17, 2009) to the CEO of a major bank asserting that "your institution should be ashamed of leading" outsourcing strategies. Indeed, when business organizations are charged or sentenced for crimes, they are accused, punished or given leniency based on behavioral, cultural and ethical factors just like

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[15] Arthur Andersen LLP provides perhaps the most stark illustration of reputational injury, as the firm was literally destroyed by the investigation and indictment following the Enron scandal. *See* Charles Lane, *Justices Overturn Andersen Conviction*, Wash. Post, June 1, 2005 (noting that by the time this Court reversed Andersen's criminal conviction, its 28,000 employees had dwindled to some 200).

"natural persons." See Memorandum from Paul J. McNulty, Deputy Attorney General, *Principles of Federal Prosecution of Business Organizations*, §§II.B, VI.B (Dec. 2006) (noting *passim* that corporations are "legal persons," and stating that "[a] corporation, like a natural person, is expected to learn from its mistakes. A history of similar misconduct may be probative of a corporate culture that encouraged, or at least condoned, such misdeeds, regardless of any compliance programs."), *available at http://www.justice.gov/dag/speeches/2006/mcnulty-memo.pdf;* see also U.S. Sentencing Comm'n, *2010 Federal Sentencing Guidelines Manual* 496 (Nov. 2010).

Fairly or unfairly, corporations are lionized or demonized just as individuals would be, and are expected to behave as moral actors that have ethics, cultures, intentions, and states of mind capable of supporting or defeating culpability.[16] There is, accordingly, no basis in FOIA, or in our customs and traditions, to exclude corporations from reasonable protection for their personal privacy interests under Exemption 7(C).

III. FOIA EXEMPTION 4 HAS BEEN CONSTRUED NOT TO PROTECT SIGNIFICANT CORPORATE PRIVACY CONCERNS.

In order to mitigate the injustice of categorically excluding associational entities from Exemption 7(C), Petitioners and their *amici* suggest that Congress fully addressed corporate privacy in Exemption 4. 5

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[16] *See, e.g*, Bus. Roundtable, *Principles of Corporate Governance 2010*, at 2 ("The board of directors, the CEO and senior management should set a 'tone at the top' that establishes a culture of legal compliance and integrity.").

U.S.C. §552(b)(4).[17] That is not correct. As applied in the lower courts, Exemption 4 leaves substantial *bona fide* corporate privacy concerns unprotected.

A. Exemption 4 Protects A Discrete Category Of Confidential Commercial Information.

FOIA Exemption 4 exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." *Id.* Given its particular focus, Exemption 4 is naturally a primary source of protection for corporate financial and proprietary data.[18] Nevertheless, Exemption 4 has been construed relatively narrowly to reach only a limited set of commercial data; it has not been interpreted to cover all corporate or associational privacy interests, let alone the acute privacy concerns discussed above.

1. "Trade Secrets"

The first class of information protected under Exemption 4 "trade secrets"—is limited to "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Pub. Citizen Health Research Group* v. *FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983). See *Ctr. for Auto Safety* v. *Nat'l Highway Traffic Safety Admin.*, 244 F.3d 144, 151 (D.C. Cir. 2001) ("Our Decision in *Public Citizen* narrowly cabins trade secrets to information relating to the 'productive process' itself."). The trade secrets prong of Exemption 4, therefore, does not protect all information that would provide a competitive advantage.

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[17] *See also* Br. of Respondent Comptel 29-31; Br. of Reporters Comm. 13-18; Br. of Free Press 27; Br. of Project on Government Oversight 25-26; Br. of CREW 11-12; Br. of Constitutional Accountability Center 18.

[18] Just as Exemption 7(C) does not arbitrarily exclude associational persons, nor does Exemption 4 arbitrarily exclude individuals. While primarily associated with business, Exemption 4 likewise applies to trade secrets and commercial or financial information submitted by "persons" who happen to be individuals. *See, e.g., Defenders of Wildlife* v. *U.S. Dep't of the Interior*, 314 F. Supp. 2d 1, 15 (D.D.C. 2004).

2. "Commercial Or Financial Information"

The second type of information protected by Exemption 4 "commercial or financial information"—is likewise limited. To qualify for its protection, information must: (1) be "commercial or financial" in nature; (2) have been "obtained from a person," and; (3) be "privileged or confidential." 5 U.S.C. §552(b)(4). These factors are discussed below.

While courts have construed the term "commercial" broadly, encompassing all information "relating to or dealing with commerce," *Am. Airlines, Inc.* v. *Nat'l Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978); see *Baker & Hostetler LLP* v. *U.S. Dep't of Commerce*, 473 F.3d 312, 319 (D.C. Cir. 2006), and have generously interpreted the requirement that information must be "obtained from a person," (including, of course, corporate persons, 5 U.S.C. §551(2)). However, Exemption 4 has been sharply curtailed by the lower courts' restrictive view of what information qualifies as "confidential" under Exemption 4.[19]

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[19] Exemption 4 requires information to have been "privileged" or "confidential." 5 U.S.C §552(b)(4). The case law focuses principally on "confidential." The few lower court opinions to

Unfortunately, courts have not generally construed Exemption 4 in accordance with a fair reading that protects documents considered to be confidential *by their owner*. See *id.* §552(b)(4). Indeed, courts have resisted this understanding even though the Senate's report on FOIA endorsed precisely this subjective view, explaining that Exemption 4 was "necessary to protect the confidentiality of information...*which would customarily not be released to the public by the person from whom it was obtained*." S. Rep. No. 89-813, at 9 (emphasis added).

Courts have focused instead on whether the effect of the disclosure would likely "(1)...impair the Government's ability to obtain necessary information in the future; or (2)...cause substantial harm to the competitive position of the person from whom the information was obtained." *Nat'l Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (footnotes omitted). This restrictive, objective test has achieved "widespread acceptance" among the lower courts. *Critical Mass Energy Project* v. *NRC*, 975 F.2d 871, 876 (D.C. Cir. 1992) (en banc).

The D.C. Circuit, the principal forum for FOIA-related actions,[20] subsequently placed a further judicial gloss on the *National Parks* test for confidentiality by assessing *why* the person submitted the information to the government. Specifically, in *Critical Mass*, it held that the

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have treated with the term "privileged" have understood it to refer to protections such as the attorney-client and settlement discussion privileges, and judicial protective orders. *See, e.g.*, *Indian Law Res. Ctr.* v. *DOI*, 477 F. Supp. 144, 148 (D D.C. 1979); *Miller, Anderson, Nash, Yerke & Wiener* v. *DOE*, 499 F. Supp. 767, 771 (D. Or. 1980).

[20] *See Litigation Under the Federal Open Government Laws 2002*, at 279 (Hammitt, Sobel & Zaid eds., 21st ed. 2002).

National Parks effects-of-disclosure test applies to all information that the submitter was *required* to provide to the government. *Critical Mass*, 975 F.2d at 879. However, information the person submitted *voluntarily* would be treated under the Senate Report's original, more protective standard; in other words, mandatory Exemption 4 protection would apply for all information "that would customarily not be released to the public by the person from whom it was obtained." *Id.*[21]

Whether a submission was voluntary or mandatory under this judicially-crafted dichotomy can be confusing. It has been held to depend on the agency's "actual legal authority," not on the submitter's subjective understanding or agency representations. See *Ctr. for Auto Safety*, 244 F.3d at 149 ("[L]inking enforceability and mandatory submissions creates an objective test; regardless of what the parties thought or intended, if an agency has no authority to enforce an information request, submissions are not mandatory."). Thus, information submitted in response to an agency's explicit demand may in fact have been a voluntary submission. *Id.* at 148-49. Conversely, information submitted in response to a letter that "merely requested, but did not require" submission of information may in fact be a mandatory submission. See *In Def. of Animals* v. *HHS*, No. 99-3024, 2001 U.S. Dist. LEXIS 24975, at *35 (D.D.C. Sept. 28, 2001).

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[21] No other circuit has expressly adopted the *Critical Mass* distinction between voluntary and compelled disclosure. In *Utah* v. *DOI*, 256 F.3d 967, 969 (10th Cir. 2001), the Tenth Circuit cited *Critical Mass* favorably, but did not adopt the test as that case regarded only compelled disclosure. Other circuits have acknowledged *Critical Mass* but declined to consider it. *See Nadler* v. *FDIC*, 92 F.3d 93, 96 n.1 (2d Cir. 1996) (recognizing that the *National Parks* test "is now 'confine[d] to information that persons are required to provide to the Government'" but finding the amendment of the test "irrelevant" because the records in question were not provided voluntarily) (alteration in original); *Inner City Press/Cmty. on the Move* v. *Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 245 n.6 (2d Cir. 2006) (noting that the Second Circuit has not yet adopted the *Critical Mass* distinction but declining to consider it because the parties did not raise it); *see also Frazee* v. *U.S. Forest Serv.*, 97 F.3d 367, 372 (9th Cir. 1996) (declining to address the *Critical Mass* distinction because the information at issue was compelled).

Information submitted voluntarily, but as a necessary prerequisite to participate in a voluntary government program, is said to be a mandatory submission. *E.g.*, *Judicial Watch, Inc.* v. *U.S. Dep't of Commerce*, 337 F. Supp. 2d 146, 169 (D.D.C. 2004); *Pub. Citizen Health Research Group* v. *FDA*, 964 F. Supp. 413, 414 n.1 (D.D.C. 1997). So too, information submitted in response to a government "request for proposal" is deemed required. *E.g.*, *Canadian Commercial Corp.* v. *Dep't of the Air Force*, 442 F. Supp. 2d 15, 29 (D.D.C. 2006), *aff'd*, 514 F.3d 37 (D.C. Cir. 2008); *Martin Marietta Corp.* v. *Dalton*, 974 F. Supp. 37, 39 (D.D.C. 1997).

Under the *National Parks* test, a corporation seeking to prevent disclosure of information it would not ordinarily release to the public, but which was required to be submitted to the government, must show that the disclosure would cause substantial harm to its competitive position.[22] This does not encompass every injury to a business's competitive position, but rather, is limited to harm stemming from "the affirmative use of proprietary information by competitors." *CNA Fin. Corp.* v. *Donovan*, 830 F.2d 1132, 1154 (D.C. Cir. 1987) (quotations omitted).

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[22] Exemption 4 does not require a showing of actual injury, but rather only "actual competition and a likelihood of substantial competitive injury." *CNA Fin. Corp.* v. *Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987); *Frazee*, 97 F.3d at 371; *Gulf & W. Indus.* v. *United States*, 615 F.2d 527, 530 (D.C. Cir. 1979).

The relatively narrow judicial view of "competitive harm" can severely limit the scope of protection available under Exemption 4—and would not likely protect a corporation's privacy interests. For example, the Exemption has been understood to offer no protection to disclosures that would result in "'customer or employee disgruntlement.'" *Pub. Citizen*, 704 F.2d at 1291 n.30. See *CNA Fin. Corp.*, 830 F.2d at 1154 (D.C. Cir. 1987) (unfavorable publicity from release of information on hiring and promotion of women and minorities does not warrant Exemption 4 protection); *Gen. Elec. Co.* v. *NRC*, 750 F.2d 1394, 1402-03 (7th Cir. 1984) (embarrassment from disclosure of internal criticism of nuclear reactor design).[23]

The D.C. Circuit recently reiterated this limitation, rejecting an argument that disclosure of Department of Defense audit reports would cause competitive harm because the corporation's "competitors will use the documents to discredit them in the eyes of current and potential customers." *United Techs. Corp.* v. *U.S. Dep't of Def.*, 601 F.3d 557, 563 (D.C.

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[23] *See also In Def. of Animals* v. *USDA*, 587 F. Supp. 2d 178, 182 (D.D.C. 2008); *Ctr. to Prevent Handgun Violence* v. *U.S. Dep't of the Treasury*, 981 F. Supp. 20, 23 (D.D.C. 1997); *Daisy Mfg. Co.* v. *CPSC*, No. 96-5152, 1997 WL 578960, at *4 (W.D. Ark. Feb. 5, 1997), *aff'd*, 133 F.3d 1081 (8th Cir. 1998); *Martech USA, Inc.* v. *Reich*, No. C-93-4137, 1993 WL 1483700, at *2 (N.D. Cal. Nov. 24, 1993). *But cf. Occidental Petroleum Corp.* v *SEC*, 873 F.2d 325, 341 (D.C. Cir. 1989) (declining to decide whether embarrassment from disclosure of bribery-related information is sufficient to trigger Exemption 4 protection).

Cir. 2010). The court reasoned that "[c]alling customers' attention to unfavorable agency evaluations or unfavorable press does not amount to an affirmative use of proprietary information by competitors" and that "Exemption 4 does not guard against mere embarrassment in the marketplace or reputational injury." *Id.* (quotations omitted).

Thus, as interpreted by the lower courts, Exemption 4 protects only a narrow (though admittedly important) subset of corporate interests. This Exemption is focused on direct competitive harm resulting from a competitor's affirmative use of a corporation's commercial information. Courts have rejected the application of Exemption 4 to other important corporate interests. Moreover, though the D.C. Circuit has crafted a reasonably protective approach in *Critical Mass.* in order not to whipsaw companies that volunteer information to the government, this methodology has not been adopted outside the Circuit and is, in any event, still considerably uncertain.

B. Gaps In Exemption 4 Protection For A Corporation's Confidential Information Are Picked Up By Exemption 7(C).

As the foregoing discussion illustrates, while Exemption 4 applies to certain commercial information, it leaves significant corporate privacy interests unaddressed. Such information is properly treated under Exemption 7(C).

1. Exemption 4 offers no protection to information that, if released, would result in reputational injury. *Supra* at 28-29. Regardless of whether disclosure would result in "'customer or employee disgruntlement,'" and an attendant commercial advantage, such information is not covered. *Pub. Citizen*, 704 F.2d at

1291 n.30. That is precisely the sort of privacy concern implicated by Section 7(C).

There is no good reason in law or policy to exclude associational persons such as corporations from reputational protection under FOIA Exemption 7(C). As discussed above, corporations share with individuals the very same sorts of concerns occasioned by the indiscriminate disclosure of law enforcement investigative files.

A corporation targeted or implicated by law enforcement can be indelibly stigmatized by release of the agency's file, even if later found to have been the target of wrongful accusations, cleared of wrongdoing, or not ultimately prosecuted for any or all of the alleged wrongs. Cf. *Fund for Constitutional Gov't*, 656 F.2d at 861, 864 (protecting "information which would reflect investigations of allegations of possible wrongdoing by individuals who were neither indicted nor prosecuted"). In addition, like individual witnesses, interviewees, or whistleblowers, corporations that cooperate with, self-disclose, or settle governmental investigations risk the stigma of being "connected in any way with a criminal investigation," *Computer Professionals*, 72 F.3d at 904.

The implications for corporations of such stigmatization could be far reaching, impairing the corporation's ability to attract and retain investors, customers, or employees—or even unduly harming its standing with other government agencies or regulators—and possibly jeopardizing its very existence. Without the complementary protection offered by Exemption 7(C), then, corporations would have no means to safeguard their legitimate privacy interests.

2. Under the *National Parks* effects-of-disclosure test, Exemption 4 considers only "substantial harm to the competitive position of the person *from whom the information was obtained.*" 498 F.2d at 770 (emphasis added). Cf. *Bloomberg, L.P.* v. *Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143 (2d Cir. 2010), *petition for cert. filed*, 79 U.S.L.W. 3271 (U.S. Oct 26, 2010) (No. 10-543) (declining to analyze harm to private banks who were the subjects of loan information sought under FOIA when the information was obtained not from the private banks but rather from the Federal Reserve Bank)). This approach leaves corporations exposed to competitive injury from the release of confidential commercial information disclosed to law enforcement by a third party.[24]

Exemption 7(C), by contrast, contains no such limitation, protecting privacy interests regardless of the source of the information, instead assessing disclosure based on the information's ability to invade personal privacy to an unwarranted degree. Exemption 7(C)'s broader view of privacy makes sense in the law enforcement context where information about suspected wrongdoing can come from a wide range of sources, including anonymous or confidential informants.

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[24] To be sure, such an unfair result may be avoided by treating the information as "voluntarily submitted." *See Gov't Accountability Project* v. *NRC*, No. 86-1976, 1993 WL 13033518, at *1 (D.D.C. July 2, 1993) (applying standard for voluntarily-submitted information to information provided by a confidential source without authorization from the corporation). But outside of the D.C Circuit, where courts have not yet adopted the *Critical Mass* distinction between voluntary and required information, it is unclear whether even such a safety valve would be available.

IV. FOIA EXEMPTIONS 4 AND 7(C) PROVIDE COMPLEMENTARY PROTECTIONS TO EFFECTUATE FOIA'S PURPOSE RESPONSIBLY.

Contradicted by FOIA's plain text and undermined by FOIA's structure and purpose, Petitioners and their *amici* resort at the last to a parade of horribles. Affirming the Third Circuit, they argue, would result in a rash of corporate abuses. *E.g.*, Br. of Reporters Committee 19-32; Br. of CREW 16-17. Separately, they lament the practical difficulties that would befall agencies having to comply with such a ruling. *E.g.*, Pet. Br. 51-53; Br. of CREW 21-22; Br. of Collaboration on Government Secrecy 19-21. These allegations are unfounded, and, upon a proper application of FOIA, highly unlikely.

It is important to recognize that disclosure under Exemption 7(C) is not mandatory. Exemption 4 leaves an agency no discretion; once the agency determines that information comes within its ambit, non-disclosure is required. See *FOIA Guide* at 355-56. Exemption 7(C), on the other hand, requires the agency to weigh the asserted privacy interest against the interests favoring public disclosure. See *Reporters Comm.*, 489 U.S. at 762.

FOIA's exemptions work together to ensure that the responsible balance Congress intended is achieved. Under Exemption 7(C), an agency must exercise its judgment as to whether or not to release the information. Only information that would entail an unwarranted invasion of the corporation's personal privacy would not be released. Where the agency concludes that the public has an interest in knowing the information in question, the agency could be permitted to release even damaging private and confidential material. On the other hand, where the agency concludes that a public release of the corporation's private and confidential information would be unduly prejudicial, undercut corporate cooperation, lend credence to false or overstated accusations, be misleading to the public, or be unfairly punitive to the corporation, the agency would have the discretion to withhold such material.

Accordingly, there is no reason to fear that Exemption 7(C) would deny the public information about, for example, failed inspections or dangerous products—where the agency believes the public should know about a company's manufacturing conditions or business practices (even beyond whatever enforcement action has been taken), the expert agency will be in a position to make that judgment. On the other hand, where the agency believes that disclosure of information is unwarranted, the information may be withheld.

A ruling for Respondent AT&T will not bury agencies under an avalanche of unprecedented, all-consuming FOIA obligations. First, it should be noted that agencies cannot, in any event, avoid considering requests to release or withhold information simply because of ostensible burden. See 5 U.S.C. §552(a)(3) (agency "shall" carry out various FOIA obligations). Second, agencies will in all likelihood have to expend time and effort to review documents containing corporate information that are the subject of FOIA requests regardless of the Court's ruling.[25] Because agencies will already have to review the documents with respect to the application of other FOIA Exemptions, such as Exemption 4, the only incremental burden will be according some consideration to Exemption 7(C) when a corporation invokes its personal privacy interests in addition to its commercial interests. Otherwise, the burden for agencies should remain fairly comparable.

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[25] Agencies are protected from undue burdens imposed by unreasonable searches or by requests that fail to reasonably describe the information requested. *E.g.*, *Trentadue* v. *FBI*, 572 F.3d 794, 797 (10th Cir. 2009), *Ruotolo* v. *DOJ*, 53 F 3d 4, 9-10 (2d Cir. 1995).

Lastly, agencies are perfectly capable of weighing potential invasions of personal privacy. Agencies can assess the public interest in the release of the information, as well as judicial guidance as to the parameters of personal privacy interest for corporations just as well as for individuals and other persons. Agencies can count on receiving ample guidance in applying FOIA. See, *e.g.*, *FOIA Guide*. See also Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009); Memorandum from the Attorney General to Heads of Executive Departments and Agencies, *The Freedom of Information Act* (Mar. 19, 2009), *available at* http://www.justice.gov/ag/foia-memo-march2009.pdf. There is no good reason why agencies cannot handle this obligation for corporations.

Allowing corporations to seek discretionary protection under Exemption 7(C) for information that is not fully protected under Exemption 4 gives effect to the reasonable balance of interests that Congress built into FOIA. If the Third Circuit's decision were reversed, agencies will be compelled to release corporate information even if the agency itself believes that the disclosure would unfairly and unnecessarily injure the corporation's privacy interests. Congress did not mandate a narrow view of personal privacy under FOIA's Exemption 7, and it would make no sense. Law enforcement agencies must act as responsible stewards of the sensitive data they collect about any person and take care to avoid indiscriminate public disclosure of such information.

CONCLUSION

For these reasons and those stated by Respondent AT&T, the judgment of the Third Circuit should be affirmed.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

Supreme Court, U.S.
FILED
DEC 16 2010
OFFICE OF THE CLERK

No. 09-1279

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *ET AL.*,
Petitioners,
v.

AT&T INC., *ET AL.*
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT AT&T INC.

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QUESTION PRESENTED

The Freedom of Information Act's Exemption 7(C) protects against the disclosure of "records or information compiled for law enforcement purposes" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(7)(C). The question presented is:

Whether all incorporated individuals and entities are categorically excluded from Exemption 7(C)'s privacy protection.

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INTEREST OF THE AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every sector and geographic region of the Country. More than 96% of the Chamber's members are small businesses with 100 employees or less, including a number of home-based, one-person operations. In addition to businesses, the Chamber's membership also includes trade and professional associations.

An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases of vital concern to the Nation's business community. The Chamber and its members have a significant interest in the question presented in this case, which concerns the privacy interests of corporations in law enforcement investigations. The Chamber, which is itself incorporated, and its corporate members frequently appear as witnesses, facilitators, cooperators, and subjects in such investigations. During those interactions, corporations submit innumerable internal documents, records, communications, and other materials, including confidential and privileged material, to the government for its review. That information is often important, sensitive, or revealing of confidential internal processes, and corporations have a strong interest in protecting such information from widespread dissemination, especially to competitors (the real risk of which is illustrated by this case). To accommodate the needed protection for confidentiality with businesses' parallel interest in cooperation with law enforcement, Exemption 7(C)'s shield is critical. That is especially true for small businesses, which are extremely vulnerable to unfair competitive and reputational harm, as well as for larger companies like respondent.

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief; letters of consent are on file with the Clerk of the Court.

This Court's determination of Exemption 7(C)'s applicability and scope, as well as its analysis of the privacy rights that corporations enjoy, will thus have a significant bearing on the ability of American businesses and business organizations to protect their reputations, identities, and confidential materials. That protection, in turn, directly affects businesses' operational viability and productivity. The Chamber submits this brief to place the concerns of the full range of American businesses before this Court.

SUMMARY OF ARGUMENT

The FCC advances a simplistic and extreme position: Exemption 7(C) does not even recognize, much less protect, *any* corporate privacy interest for *any* incorporated individual or entity under *any* circumstances. That argument is wrong, for all of the reasons advanced by respondent, and at least three others.

First, the FCC's interpretation ignores more than a century of precedent from this Court holding that corporations enjoy a range of protected constitutional and statutory rights, including privacy rights. Of most relevance here, this Court has repeatedly held in the law enforcement context that the privacy interests of corporations are protected against law-enforcement intrusion by the Fourth Amendment.

To be sure, a corporation's protections are not identical to those of natural persons under the Constitution or common law. But the issue here is whether corporations have any privacy right against law enforcement intrusion and protection against the harm that the disclosure of law enforcement records would inflict. The FCC's one-size-fits-all preclusion of *all* privacy rights for *all* corporations (and any other associations who do not qualify as "particular individual human being[s]," FCC Br. 13) would do what this Court has repeatedly refused to do: it would make Exemption 7(C) *narrower* than the Constitution's and common law's protection.

Congress legislated against a backdrop of recognized privacy rights in corporations when it adopted Exemption 7(C), and no evidence indicates that, when Congress included the word "personal" in the exemption, it intended to strip corporations of their well-established rights or to woodenly shut the door to any corporate privacy interest outside of Exemption 4's straitened scope. Quite the opposite, Congress's express inclusion of corporations as "persons" under FOIA reflects a congressional determination to invest corporations with the same protection as all the other persons whose privacy is protected by Exemption 7(C).

Second, by denying wholesale the existence of any corporate privacy interest in law enforcement records, the FCC upsets the balance that Congress struck in enacting Exemption 7(C). That Exemption balances privacy interests against the public interest in disclosure, and this Court has been explicit that the only relevant public interest is in learning about the *government's* activities. To ensure that FOIA's operation stays focused on the disclosure of information about the government, and not private individuals or entities, this Court has consistently defined the privacy interest protected by Exemption 7(C) capaciously and pragmatically. The FCC's approach eschews this flexibility in favor of a categorical rule subjecting any and all sensitive corporate information (falling outside Exemption 4's narrow confines) to automatic disclosure in all cases. The FCC's headlong rush toward disclosure, however, does nothing to advance the public interest in *government* transparency or to contribute to the public's understanding of the *government's* operations and activities.

Third, the threat of disclosure will harm law enforcement interests by chilling the ability of corporations (and other associations) to cooperate and communicate with law enforcement about matters of joint concern. The FCC's interpretation will also devastate small businesses that lack the resources to rehabilitate their reputations after disclosures that damage their business reputation and goodwill. Congress enacted FOIA to tell citizens what its government is up to, not to arm business competitors with a new tool in industrial warfare or to make a business's humiliation and economic devastation the price of law enforcement cooperation.

ARGUMENT

I. CORPORATE PERSONS, INCLUDING NON-PROFITS, MUNICIPAL, AND INDIVIDUAL OR PROFESSIONAL CORPORATIONS, ARE NOT CATEGORICALLY EXCLUDED FROM EXEMPTION 7(C)'S PROTECTION OF PERSONAL PRIVACY

The Chamber agrees strongly with the arguments presented by respondent, and in particular its straightforward textual analysis of FOIA'S inclusion of corporations as "person[s]" under FOIA, 5 U.S.C. § 551(2). The FCC's foundational error in construing FOIA's Exemption 7(C) is encapsulated in its opening reliance on a generic dictionary definition of "personal" (FCC Br. 18). The problem is that the dictionary the FCC uses comes to that definition by first defining the root word "person" in the same terms. *See Webster's Third New Int'l Dictionary* 1686 (2002).

FOIA's starting point, however, is that corporations are "person[s]," 5 U.S.C. § 551(2), and the term "personal" accordingly must be construed against that definitional baseline. Indeed, the FCC's argument ignores that Congress, unlike *Webster's*, has deemed "the word 'person'" to include "bodies politic and corporate" since 1871. *See* Dictionary Act, Act of Feb. 25, 1871, § 2, 16 Stat. 431.[2]

The operative question before this Court thus is whether Congress, having chosen to include "corporation[s]" as "person[s]" protected by FOIA's exemptions and having long statutorily treated corporations as "persons," would then have categorically concluded that no such corporate person – no business, non-profit, incorporated political or advocacy organization, sole, or professional corporation – would ever have any distinct privacy interest in records that might come into the hands of federal law enforcement officials. The FCC's complete excision of every corporate privacy interest from the vast sweep of materials that come into law enforcement's possession defies not only the text of FOIA, as respondent explains (Br. 14-18), but precedent and logic.

A. The FCC's Interpretation Of Exemption 7(C) Ignores Precedent From This Court Recognizing That Corporations Have Privacy Rights, In Particular In The Law Enforcement Context

The FCC's position that all corporations are so devoid of any privacy interest as to be categorically excluded from Exemption 7(C)'s protection is unmoored from more than a century of this Court's precedent recognizing that corporations enjoy rights under the Constitution including, of most relevance, here, privacy rights against law enforcement intrusion.

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[2] Today, the Dictionary Act, as amended, establishes that the word "person" includes "corporations." *See* 1 U.S.C. § 1.

The starting point is the long "settled" rule "that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws." *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 592 (1896); *see also Southern Railway v. Greene*, 216 U.S. 400, 412 (1910) (Equal Protection Clause protects the corporations of one State against discrimination in another State); *Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888) (Equal Protection Clause protects corporations to the same extent that it protects "similar associations within the jurisdiction of the state"); *see generally First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 780 n.15 (1978).

Of most relevance here, in 1906, this Court has explicitly recognized that corporations have a right to privacy in the law enforcement context. In *Hale v. Henkel*, 201 U.S. 43 (1906), this Court held that every "person, be he individual or corporation, is entitled to protection" against unreasonable searches and seizures, *id.* at 76. In so holding, the Court explained that "[a] corporation is, after all, but an association of individuals under an assumed name with a distinct legal entity." *Ibid.*[3]

This Court's recognition of corporations as distinct entities invested with rights of autonomy, confidentiality, and privacy as against governmental intrusion continued in *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977). In *Martin Linen*, the Court held that corporations are "person[s]" protected by the Double Jeopardy Clause of the Fifth Amendment. The Court reasoned that corporations, as much as natural persons, would be "subject[ed] * * * to embarrassment, expense and ordeal and * * * liv[ing] in a continuing state of anxiety and insecurity" were they to be subject to "repeated attempts" by the State "to convict the[m]." *Id.* at 569 (quotation marks omitted). The Court thus recognized that corporations, just like natural persons, could suffer embarrassment, insecurity, anxiety, and ordeal at the hands of government officials. *See also Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (Double Jeopardy barred re-trial of corporate defendant).

Ensuring that, in the course of revealing the *government's* activities and operations, FOIA does not inflict such private embarrassment, harassment, and unwanted exposure is Exemption 7(C)'s central mission. *See United States Dep't of State v. Ray*, 502 U.S. 164, 176 (1991) (protection against "embarrassment in their social and community relationships"); *id.* at 177 (protection against "retaliatory action"); *United States Dep't of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 769 (1989) (privacy interest in keeping "wholly forgotten" matters "away from the public eye").

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[3] The *Hale* Court also held that corporations are not protected by the Fifth Amendment privilege against self-incrimination. 201 U.S. at 46. The Court reasoned that the corporate charter bound the corporation to comply with the law and, thus, that the Fifth Amendment's division of power between the prosecutor and an accused individual did not extend to corporations, *id.* at 75. However, unlike the Court's Fourth Amendment holding, this part of the opinion said nothing about the right to *privacy*.

Likewise, in *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986), the Court confirmed the Fourth Amendment's application to a corporation *qua* corporation, explaining that "Dow plainly has a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings, and it is equally clear that expectation is one society is prepared to observe." *Id.* at 236.

Thus, in direct contradiction to the FCC's argument here, this Court has recognized that corporations themselves have privacy expectations that society respects as reasonable, and can suffer the same types of embarrassment, harassment, and intrusion harms that Exemption 7(C) aims to avoid. Even more importantly, that privacy interest goes beyond the narrow category of commercial records and documents protected by FOIA Exemption 4, and broadly protects the integrity of corporate property and privacy as against law enforcement exposure, which is the heart of Exemption 7(C). *See also, e.g.*, *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977) (collecting cases for the dual propositions that corporations have Fourth Amendment rights, and that business premises are protected by the

Fourth Amendment). Privacy rights for corporations are not confined to the constitutional context either. In 1948, Congress passed the Trade Secrets Act, which makes it a crime for government officials to disclose private and confidential corporate information. *See* 18 U.S.C. § 1905. And under the common law, corporations have the right to assert the privacy protections of the attorney-client privilege and the work-product rule, *see Upjohn Co. v. United States*, 449 U.S. 383, 395, 401-402 (1981), as well as the right to bring actions in defamation for speech that injures their reputation, *see* Restatement (Second) of Torts § 561. *See also* Resp. Br. 26-27 (citing numerous examples of the law's protection of corporations' privacy). While the FCC is content to cast all of those privacy protections away, nothing in FOIA's text or Congress's purpose requires the unqualified and unyielding categorical excision of corporations from Exemption 7(C)'s privacy protection that the government seeks.

The FCC invokes (Br. 48) this Court's statement in *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), that "corporations can claim no equality with individuals in the enjoyment of a right to privacy," *id.* at 652. But that is of no help to the government. First, the statement long predates and has been largely overtaken by *Dow Chemical*'s express recognition of privacy interests for corporations that society recognizes as reasonable.

Second, and more importantly, the question here is not whether the privacy rights between corporations and natural persons are "equal[]," but whether any corporate privacy right against law enforcement intrusion exists at all. *Morton Salt* says nothing about that, but *Dow Chemical* emphatically does.

At bottom, then, the question is not whether corporations have privacy rights. They plainly do. The question instead is whether this Court should, for the first time ever, read FOIA's protection of personal privacy in Exemption 7(C) to be *narrower* than the Constitution and common law. *Contrast National Archives & Records Administration v. Favish*, 541 U.S. 157, 170 (2004) ("[T]he statutory privacy right protected by Exemption 7(C) goes beyond the common law and the Constitution."); *Reporters Committee*, 489 U.S. at 762 n.13. As respondent explains, especially given FOIA's definition of "person" to include "corporation[s]," 5 U.S.C. § 551(2), there is no textual basis for that backwards result.

Nor would it make any sense. The FCC's straitened and anachronistic conception of corporate rights confounds Congress's intent that courts take a "common sense approach" to Exemption 7(C)'s scope and defies Congress's effort to "eliminate any possibility of an overly literal interpretation" of the Exemption's text. S. Rep. No. 221, 98th Cong., 1st Sess. 22 (1983).[4]

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[4] Because the 1986 revision of Exemption 7(C) was enacted through a floor amendment, there are no contemporaneous committee reports to consult. This Court, however, has previously relied on the 1983 Senate Report, which addressed the virtually identical amendments, in construing the 1986 amendments. *See Reporters Committee*, 489 U.S. at 777.

It also ignores the role of corporations in society and the economy at the time Congress enacted Exemption 7(C)'s key language in 1986. Modern corporations take on myriad forms, including single individuals, Mom-and-Pop businesses, and minority or unpopular political advocacy groups, and they pursue a vast array of economic, charitable, political, and social ends, all of which could be harmed by broadly opening their communications with federal law enforcement to public display.

B. Exemption 4's Narrow Protection Falls Far Short Of The Privacy Interests That Corporations Enjoy

The FCC's suggestion that Exemption 4 provides all the privacy protection that corporations merit (Br. at 24-27) misses the mark.

First, Exemption 4 protects only "commercial or financial" records, 5 U.S.C. § 552(b)(4), a phrase that does not commonly reach a variety of corporate records, such as internal emails, candid internal exchanges of advice on non-commercial matters, or a host of records maintained by non-profit, sole, closely held, or municipal corporations. While the FCC's reading of Exemption 7(C) might allow the redaction of identifying information about individual members of incorporated advocacy groups, like the NAACP, Public Citizen, or the American Friends Service Committee, its theory would offer no protection to collective information about the number, geographical dispersion, or demographic makeup of such organizations. Nor would it offer any protection – other than blacking out names – to internal communications between members about the organization's goals, interests, or political viewpoints, since those are not naturally considered to be "commercial" or "financial" records.

It is no secret that the federal government's law enforcement officials sometimes investigate the activities of private advocacy associations, undoubtedly creating law enforcement records of those corporations' sometimes intimate and sensitive (but not "commercial" or "financial") internal communications. *See, e.g.*, Jerry Markon, ***FBI Probes of Groups Were Improper, Justice Says***, WASH. POST, Sept. 20, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/09/20/AR2010092003100.html (describing a Department of Justice Inspector General report documenting improper FBI investigations of liberal advocacy organizations, including the Thomas Merton Center, Greenpeace, and the Catholic Worker Movement, the first two of which were incorporated, after the September 11, 2001 attacks).

"Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *National Ass'n for the Advancement of Colored People, a Corporation v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958); *cf. Roberts v. United States Jaycees*, 468 U.S. 609, 622-623 (1984) ("According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority," and noting that governmental efforts "to interfere with the internal organization or affairs of the group" may infringe on such association). But FOIA, according to the FCC, now compels the government to turn those documents over to any requester and even, under the e-FOIA provisions, to post the private and internal records of incorporated advocacy and associational groups on agency websites, regardless of the propriety of the law enforcement investigation.[5]

Indeed, under the FCC's rigid view, FOIA apparently would mandate the broad public disclosure of non-profit and advocacy group records seized by law enforcement even if those records were obtained in violation of the First or Fourth Amendment and thus were subject to suppression as an unconstitutional intrusion on privacy interests. Everybody but the jury could see them because FOIA permits no discrimination based on the identity of the requester. *Favish*, 541 U.S. at 170. That is not what FOIA is about, and there is no sensible reason that Exemption 7(C)'s personal privacy protection would woodenly exclude the recognized privacy interests of incorporated persons in law enforcement records in that manner.

The records and private inter-governmental communications of municipal corporations like New

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[5] *See* 5 U.S.C. § 552(a)(2)(D) (requiring agencies to make available in their FOIA reading rooms "copies of all records * * * which * * * the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records," and to produce certain records in electronic format); President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683, 4683 (Jan. 21, 2009) (directing agencies to "use modern technology" to make proactive disclosures).

York City and Chicago that engage in joint law enforcement efforts with the federal government would also now be at risk of disclosure under FOIA (albeit with individual names redacted) if this Court holds that corporations are categorically excluded from Exemption 7(C). Exemption 7(A)'s protection would not fill in the gap because that exemption's protection ends when law enforcement proceedings end. *See National Labor Relations Board v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 230 (1978) (Exemption 7(A) "d[oes] not endlessly protect material"); *Computer Professionals for Social Responsibility v. United States Secret Service*, 72 F.3d 897, 907 (D.C. Cir. 1996).[6]

The FCC's wooden exclusion of such corporations, moreover, fails to come to grips with this Court's decision in *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978), which held that municipal corporations are "persons" within the meaning of 42 U.S.C. § 1983. In so holding, the Court explained that, "by 1871, it was well understood that corporations should be treated as natural persons for *virtually all purposes of constitutional and statutory analysis*," *id.* at 687 (emphasis added). *See also id.* at 687-688 (relying interchangeably on cases involving business and municipal corporations).

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[6] Exemption 7(D) would only apply if the city could prove that it was a confidential "source" in the investigation. *United States Dep' t of Justice v. Landano*, 508 U.S. 165, 181 (1993) (construing the exemption "narrowly" so that "the Government is not entitled to a presumption that a source is confidential within the meaning of Exemption 7(D)").

Second, the FCC's confident assertion (Br. 25) that Exemption 4 will protect most business information glides over the fact that the Exemption 4's protection varies substantially depending on whether the information was provided voluntarily or involuntarily to the government. Where the information is required, even the most confidential business records can be disclosed by the government unless the business carries the burden of showing, in a reverse-FOIA action, that disclosure is "likely" "to cause *substantial* harm to the competitive position of the person from whom the information was obtained." *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 878, 879 (D.C. Cir. 1992) (en banc) (emphasis added).[7]

Including FOIA's corporate "persons" in Exemption 7(C)'s privacy protection, however, would ensure that Exemption 4's significantly qualified protections would not impair the substantial public interest in law enforcement cooperation by all persons, including corporations. Indeed, Congress specifically amended Exemption 7(C) in 1986 to impose an objective test to protect privacy interests in law enforcement records. That is why Exemption 7(C) now "applies to any disclosure that 'could reasonably be expected to constitute' an invasion of privacy that is 'unwarranted,'" as opposed to disclosures that "would" result in harm. *United States Dep't of Defense v. Federal Labor Relations Authority* ("*FLRA*"), 510 U.S. 487, 496 n.6 (1994). Exemption 4, which was enacted two decades before Exemption 7(C)'s objective test, Pub. L. No. 89-487, 80 Stat. 250 and Pub. L. No. 90-23, § 1, 81 Stat. 54, is incapable of offering such protection for private business materials in law enforcement records, because it requires proof that disclosure in the particular case actually "*would* be likely" to cause "*substantial*" harm. *Critical Mass*, 975 F.2d at 878 (emphasis added). *See FLRA*, 510 U.S. at 496 n.6 (noting the operative difference between the "could" and "would" cause harm formulations in FOIA's exemptions).

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[7] The D.C. Circuit first cleaved Exemption 4's protection into two distinct standards depending on whether the information was voluntarily or involuntarily provided in *Critical Mass*, 975 F.2d at 872. In the view of the Chamber, that aspect of *Critical Mass* is incorrect, and there should be a single uniform inquiry into confidentiality that governs all Exemption 4 cases and that focuses exclusively on whether the materials customarily are created and treated confidentially. *See id.* at 878-880; *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 931 F.2d 939, 947-948 (D.C. Cir. 1991) (Randolph & Williams, JJ., concurring).

In short, the FCC's argument fails to provide the very specialized protection for privacy in law enforcement records – a heightened protection that serves the substantial public and *governmental* interest in encouraging forthcoming cooperation with law enforcement – that the government has long sought under Exemption 7(C). *See, e.g.,* U.S. Opening Br. at 17, 44, *Favish, supra*; U.S. Reply Br. at 17, *Favish, supra.*[8]

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[8] The FCC suggests (Br. 25) that information would also be protected under Exemption 4 if disclosure would "impair the Government's ability to obtain necessary information in the future" or impede "administrative efficiency and effectiveness." A number of courts have held, however, that private persons

C. The FCC's Position Ignores The Context And Balanced Structure Of Exemption 7(C)

This Court's cases establish two aspects of Exemption 7(C)'s operation that the FCC's position in this case defies. First, the privacy interest in Exemption 7(C) is more comprehensive and flexible than the FCC suggests. Rather than referring only to "matters that relate to a particular individual human being," as the FCC argues (Br. 13), the personal privacy interest that FOIA protects encompasses materials relating to others as well, including groups, like a family. The privacy protection also exceeds what the common law provides, and even extends to such non-intimate materials as criminal record "rap" sheets.

Second, FOIA Exemption 7(C) only protects material from disclosure if the relevant privacy interest outweighs any public interest in government transparency and accountability. This balancing test ensures that material bearing on the public's right to know about the operations and activities of its government will still be subject to disclosure, even if Exemption 7(C) protects corporations. There thus is little upside, but much downside, to the FCC's inflexible and troublesome position.

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cannot assert those two defenses to disclosure; only the government can. *See United Technologies Corp. v. United States Dep' t of Defense*, 601 F.3d 557, 565 (D.C. Cir. 2010); *Hercules, Inc. v. Marsh*, 839 F.2d 1027, 1030 (4th Cir. 1988); *Comdisco, Inc. v. General Servs. Admin.*, 864 F. Supp. 510, 516 (E.D. Va. 1994).

1. *This Court's Pragmatic Definition Of Exemption 7(C)'s Privacy Protection Logically Includes The Privacy Of Corporate Persons*

Congress did not intend for FOIA to afford the general public a right of access to the vast amounts of "information about *private citizens* that happens to be in the warehouse of the Government." *Reporters Committee,* 489 U.S. at 774. Accordingly, "the concept of personal privacy under Exemption 7(C) is not some limited or cramped notion of the idea." *Favish,* 541 U.S. at 165 (quotation marks omitted); *see Reporters Committee,* 489 U.S. at 774 (rejecting a "cramped notion of [the] personal privacy" that FOIA protects); *cf. Whalen v. Roe,* 429 U.S. 589, 605 (1977) ("We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files."). Indeed, in *Reporters Committee,* the Court held that criminal history records – "rap sheets" – are exempted from disclosure under Exemption 7(C), even though the individual records of conviction are matters of public record. 489 U.S. at 762-780.

Importantly, in *Favish,* this Court adopted a practical and functional reading of the "personal" privacy that Exemption 7(C) protects, holding that it extends beyond images or documents about a "particular individual" person (FCC Br. 13) to include records about a third person – a family decedent. 541 U.S. at 170-171. That "personal privacy" applies, moreover, even if the decedent was a high-level government official who died in a public place. *Id.* at 160, 167.

Exemption 7(C) also protects against the disclosure of information about an individual that is already in the public record, but that is "intended for or restricted to the use of a particular person or group or class of persons" and is "not freely available to the public." *Reporters Committee*, 489 U.S. at 763-764 (quoting *Webster's Third New Int'l Dictionary* 1804 (1976)). The "practical obscurity" of such information and its "hard-to-obtain" character work together to create a FOIA-protected privacy interest against the information's broad disclosure to the public. *Reporters Committee*, 489 U.S. at 762, 764; *see also FLRA*, 510 U.S. at 497 (protecting the addresses of government employees).

The FCC's rigidly automatic and unyielding excision of every and all corporate entities from Exemption 7(C)'s privacy protection cannot be reconciled with that practical and contextually flexible conception of privacy adopted by this Court – at the United States' behest – in *Reporters Committee*, *Favish*, and *FLRA*. Nor does it comport with the FCC's acknowledgment that corporations do enjoy privacy protections in their interactions with law enforcement, which is the precise focus of Exemption 7(C). Br. at 47-48.

Instead, the FCC's central argument (beyond its reliance on an inapt dictionary definition of "person" and "personal") is that the nature of the privacy protection enjoyed by corporate persons is somewhat more variable than natural persons, existing in some contexts but not in others. *See* Br. at 48 (citing *Morton Salt Co., supra*). That may be true. But the acknowledgment that there *are* recognized and well-established corporate privacy interests *vis-a-vis* law enforcement – interests that are not co-extensive with Exemption 4's cabined coverage – proves the opposite of what the FCC argues. It dictates that Exemption 7(C)'s heretofore comprehensive protection of information that is "not freely available to the public," *Reporters Committee*, 489 U.S. at 764, should extend to corporations (and other associations). Any variations in the law's coverage of corporate privacy interests could then be factored into Exemption 7(C)'s balancing test. That, in fact, is precisely what this Court did in *Favish*, when it recognized that finding a privacy interest in family members "does not mean that the family is in the same position as the individual who is the subject of the disclosure." 541 U.S. at 167. There is certainly no basis in precedent or logic for holding that Exemption 7(C)'s protection of privacy is *narrower* than the Constitution's or common law's.

2. *Protecting The Privacy Of Corporate Persons Is Important*

Giving recognition and protection to that privacy interest is important to FOIA's calibrated operation and the longstanding recognition that "legitimate governmental and private interests could be harmed by release of certain types of information," *United States Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988), and thus that "public disclosure is not always in the public interest," *Central Intelligence Agency v. Sims*, 471 U.S. 159, 166-167 (1985).

First, without privacy protection, any corporate information in the government's hands, no matter how private or privileged, that falls outside of Exemption 4 will automatically be disclosed. There is no need for that. The balancing test that already applies under Exemption 7(C), *see generally Favish, supra,* already will factor in any of the limitations on the scope of corporate persons' privacy of concern to the government. But without recognized privacy protection, corporations – and every other association or group that does not meet the FCC's "individual human being" test (Br. 13) – will have nothing at all to balance even when there is *no* public interest in disclosure at all, such as when disclosure is sought by a competitor simply to advance its own economic interests. Even a reduced or slight privacy interest would prevent disclosures serving such purely mercenary interests because "something, even a modest privacy interest, outweighs nothing every time." *Consumers' Checkbook Center for the Study of Services v. United States Dep't of Health & Human Servs.*, 554 F.3d 1046, 1056 (D.C. Cir. 2009) (quoting *National Ass'n of Retired Federal Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989)); *see also Stone v. Federal Bureau of Investigation*, 727 F. Supp. 662, 667 n.4 (D.D.C. 1990) (noting that private curiosity "and the public interest are not necessarily identical"), *aff'd*, No. 90-5065, 1990 WL 134431 (D.C. Cir. Sept. 14, 1990); *Julian*, 486 U.S. at 17 (Scalia, J., dissenting) (" FOIA is not meant to provide documents to particular individuals who have special entitlement to them, but rather 'to inform the *public* about agency action.' ")(alteration in original) (citation omitted).

Second, adoption of the FCC's categorical exclusion would confound the public interest in effective law enforcement and private cooperation with investigations. As the United States has previously argued to this Court, "only an artificial and wooden conception of the public interest would *always* weigh in favor of more disclosure" under FOIA. U.S. Br., *Favish, supra*, at 44. In fact, the public interest in effective law enforcement and in encouraging cooperative disclosures and dialogue in law enforcement investigations strongly favor including the privacy interests of incorporated persons in Exemption 7(C)'s balanced protection. That is because investigations of business and white collar crimes, in particular, depend heavily on the cooperation of corporate entities.[9]

American corporations, moreover, have been exceptionally proactive in ferreting out misconduct within their ranks, disciplining those responsible and implementing policies and procedures to prevent future wrongdoing. Indeed, in this case, it was respondent that first brought the results of its own internal investigation to the government's attention.

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[9] For example, the Department of Justice's manual for U.S. Attorneys states that charging decisions against corporations should be based, in part, on the extent of voluntary cooperation furnished by corporations. *See* U.S. Attorney's Manual, § 9-28.700, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm. The Securities and Exchange Commission and the Environmental Protection Agency also have voluntary disclosure programs in place, as do a number of other agencies. *See, e.g.*, *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions*, Exchange Act Release No. 44,969 (Oct. 23, 2001), *available at* http://www.sec.gov/litigation/investreport/34-44969.htm; Environmental Protection Agency, Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618 (Apr. 11, 2000).

Pet. App. 2a-3a. The FCC's "no corporate good deed goes unpunished" approach to such forthcoming disclosures and cooperation, however, profoundly disserves the public interest in promoting the cooperative relationship between corporate citizens, regulators, and law enforcement agencies.

Third, the FCC's interpretation of the disclosure requirement will also disproportionately harm small businesses, closely held, and sole corporations. The FCC has adopted a one-size-fits-all policy, arguing that regardless of a corporation's size or character, the corporation, as distinct from its shareholders and employees, has no protected privacy interest. That argument ignores that the vast majority of corporations – 96% of all the Chamber's members – are businesses with fewer than 100 employees. *See* M. Keightley, Congressional Research Service Report for Congress, Business Organizational Choices: Taxation and Responses to Legislative Changes 10 (2009) (more than 75% of corporations whose income is taxed under federal law, *see* 26 U.S.C. § 301, have less than $1 million in receipts per year). For small businesses and organizations – especially for sole and professional corporations – the FCC's distinction is unworkable because their identity is bound up with the identity of the individuals who operate the corporation. Nor, in those situations, will it be easy for courts to disentangle the individual's privacy from the corporate person's privacy.

Negative publicity surrounding law enforcement actions, moreover, can have devastating effects on businesses. For example, the Department of Justice indicted the accounting firm Arthur

Andersen on March 7, 2002. This Court reversed that conviction on May 31, 2005, but by that point, the firm was already moribund. The stigma of the indictment alone destroyed the business and resulted in the loss of tens of thousands of jobs.[10] As the D.C. Circuit has noted, a "FOIA disclosure that would announce to the world that * * * certain individuals were targets of an * * * investigation, albeit never prosecuted, may make those persons the subjects of rumor and innuendo, possibly resulting in serious damage to their reputations." *Stern v. Federal Bureau of Investigation*, 737 F.2d 84, 92 (D.C. Cir. 1984) (internal quotation marks omitted). Small businesses, sole corporations, non-profit corporations, and intimate associations have even less wherewithal than companies the size of Arthur Anderson to withstand law enforcement disclosures about their internal and private practices, communications, and activities.

The FCC tries to elide the natural consequences of its position by suggesting (Br, 36 n.11) that courts will prophylactically throw a wider net of individualized protection in such cases. But this is a statute that is being construed, and courts cannot make up new rules as they go along. In a reverse-FOIA action (as this case functionally is), the corporation will bear the burden of proving its entitlement to have the documents withheld from disclosure, and under the FCC's view, that burden will only be met if the risk of invading an "individual human being's" privacy is established. The FCC's categorical position leaves no margin of error in that analysis.

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[10] *See* Christopher A. Wray & Robert K. Hur, *The Power of the Corporate Charging Decision Over Corporate Conduct*, 116 YALE L. J. Pocket Part 306, 306 n.2 (2007).

Nor is there any logical basis for the FCC's solicitude for sole or closely held corporations, but not for slightly larger Mom-and-Pop businesses or advocacy organizations, for which the integrity of internal communications and records can be just as critical to survival.

In short, given (i) the plain text of FOIA, (ii) the long line of precedent recognizing the privacy interests of corporate persons in the law enforcement context in particular, (iii) FOIA's disavowal of any legitimate interest in disclosing private, rather than governmental, conduct, and (iv) the substantial public interest in promoting forthcoming cooperation with law enforcement, the FCC's categorical and wholesale exclusion of every corporate person from Exemption 7(C) is wrong, is unworkable, is contrary to precedent, and, accordingly, should be rejected.

3. *Exemption 7(C)'s Balancing Test Protects The FCC's Interests*

For all the substantial harm that stripping corporations of the heightened protection for privacy afforded by Exemption 7(C) would cause, there is no corresponding benefit gained by the FCC's rigidly exclusionary rule.[11] That is because Exemption 7(C) contains a built-in check on meritless invocations of privacy rights, limiting the Exemption's protections to "*unwarranted* invasion[s] of personal privacy." 5 U.S.C. § 552(b)(7)(C) (emphasis added). If "the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake," and disclosure "is likely to advance that interest," then any privacy interest will commonly be outbalanced and the information disclosed. *Favish*, 541 U.S. at 172.

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[11] It bears repeating, moreover, that the FCC's "individual human being" position would not seem to stop with incorporation and would, instead, presumably include all non-

Application of that time-tested and calibrated balancing test effectuates FOIA's purpose of allowing persons to determine "what their government is up to," *Reporters Committee*, 489 U.S. at 773, far better than the FCC's unbending exclusion. To be sure, that balancing test might not permit the disclosure of *all* records concerning corporations' internal affairs that happen to be in the government's vast storehouses of information. But FOIA does not favor the disclosure of information in the government's hands for its own sake. "[T]he only relevant public interest" under FOIA, *FLRA*, 510 U.S. at 497, is the disclosure of information that would "contribute *significantly* to public understanding of the operations of activities *of the government*" itself, *Reporters Committee*, 489 U.S. at 775 (emphasis added); *see also Bibles v. Oregon Natural Desert Ass'n*, 519 U.S. 355, 355-356 (1997) (per curiam).

The categorical exclusion of all corporate persons from Exemption 7(C) does nothing to increase the

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incorporated groups and associations, except for those families covered by *Favish*.

exposure of *governmental* records and activities to the public. The FCC nowhere argues that the disclosure it seeks to make here would cast any significant light on *governmental* wrong-doing or right-doing. It would simply turn FOIA into a fount of information about private entities sought by ambitious business competitors, individuals in search of a lawsuit, or a "sensation-seeking culture," *Favish*, 541 U.S. at 166.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 09-1279

In The
Supreme Court of the United States

◆

FEDERAL COMMUNICATIONS COMMISSION,
et al.,
Petitioners,

v.

AT&T, INC., *et al.,*
Respondents.

◆

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

◆

BRIEF OF AMICI CURIAE CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, THE ELECTRONIC FRONTIER FOUNDATION, THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN LIBRARY ASSOCIATION, THE ASSOCIATION OF RESEARCH LIBRARIES, THE NATIONAL SECURITY ARCHIVE, AND OPENTHEGOVERNMENT.ORG IN SUPPORT OF PETITIONERS

◆

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QUESTION PRESENTED

Exemption 7(C) of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(7)(C), exempts from mandatory disclosure records or information compiled for law enforcement purposes when such disclosure could reasonably be expected to constitute an unwarranted invasion of "personal privacy." The question presented is whether Exemption 7(C)'s protection for "personal privacy" protects the "privacy" of corporate entities.

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INTEREST OF *AMICI CURIAE*[1]

Citizens for Responsibility and Ethics in Washington ("CREW") is a non-profit, non-partisan corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government agencies and officials and to ensure the integrity of those officials. As part of its research, CREW uses government records made available to it under the FOIA. Currently, CREW has FOIA requests pending with multiple federal agencies on a wide range of issues, including, among others, requests for documents that would shed light on the causes of the BP oil spill and the government's reaction to that spill.

The Electronic Frontier Foundation ("EFF") is a non-profit public interest organization that examines the potential impact of cutting edge information technology on individual liberties and strives to inform the public about those issues. In support of its mission, EFF pursues FOIA requests that focus on, among other things, government collection and use of personal information about Americans and federal agencies' development and use of new information technologies. EFF makes information obtained through such requests available to the public, the media, and policymakers.

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[1] No party or counsel for any party to this case authored this brief in whole or in part, except that current counsel for respondent CompTel, in her prior and exclusive capacity as counsel of record for *amici* CREW, EFF, the National Security Archive, and OpenTheGovernment.org, previously filed an *amicus* brief in support of the petition for a writ of certiorari from which parts of this brief are drawn, but did not author any of this brief in whole or in part since becoming counsel for CompTel. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the *amici curiae* has made a monetary contribution to the preparation or submission of this brief. The parties have consented to this filing.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU has relied extensively on the Freedom of Information Act in support of its mission, and has participated in numerous FOIA cases in this and other courts, both as direct counsel and as *amicus curiae*.

The American Library Association ("ALA") is the oldest and largest library association in the world, with more than 61,000 members. Its mission is to provide leadership for the development, promotion, and improvement of library and information services and the profession of librarianship in order to enhance learning and ensure access to information for all. As part of its mission, ALA advocates for policies and programs that promote affordable access to broadband services to the American public through public and school libraries that are primary beneficiaries of the E-rate discounts. To maximize the effectiveness of the program, ALA provides training, information, and research to the library community, all of which require full information about the E-rate process.

The Association of Research Libraries ("ARL") is a nonprofit organization of 126 research libraries in North America. ARL's members include university libraries, public libraries, and government and national libraries. ARL influences the changing environment of scholarly communication and the public policies that affect research libraries and diverse communities they serve. Maintaining a strong and robust Freedom of Information Act is of primary interest to ensure transparency of government.

The National Security Archive is an independent, non-governmental research institute and library located at the George Washington University that collects and publishes declassified documents concerning United States foreign policy and national security matters obtained under the FOIA. As part of its mission to broaden access to the historical record, the Archive is a leading user of the FOIA. In addition, through litigation and public advocacy, it works to defend and expand public access to government information.

OpenTheGovernment.org is a coalition of consumer and good government groups, environmentalists, journalists, library groups, labor and others united to make the federal government a more open place in order to make us safer, strengthen public trust in government, and support our democratic principles.

SUMMARY OF ARGUMENT

1. The express language of Exemption 7(C) of the FOIA, 5 U.S.C. § 552(b)(7)(C), and the legislative intent behind the exemption point unmistakably to an interpretation that excludes any protection for so-called "privacy" interests of corporate entities. The term "personal privacy" used by the exemption to describe its reach applies exclusively to individuals, not abstract and artificial constructs like corporations. Congress enacted Exemption 7(C) to extend to information in agency law enforcement files the privacy protections of Exemption 6, 5 U.S.C. § 552(b)(6), long understood to apply only to individuals. Further reinforcing this view are the harms Exemption 7(C) was designed to protect against, such as the humiliation and embarrassment that accompany the invasion of an individual's personal privacy. Exemption 7(C) affords protection from embarrassment and other disquieting human emotions experienced only by individuals, not corporate entities.

This is not to say corporations have no protection for their interests under the FOIA. Exemption 4, 5 U.S.C. § 552(b)(4), shields corporations from the harm caused by the disclosure of trade secrets and other confidential business information. The different treatment the FOIA affords corporations (by protecting their confidentiality interests) and individuals (by protecting their personal privacy), reflects the differing relationships each has with the federal government. Corporations are heavily regulated entities, subject to federal and state laws that require them routinely to make public a host of financial and other data. Individuals, by contrast, enjoy a zone of privacy from the government, and Exemption 7(C) recognizes the primacy of their privacy interests.

2. Extending the privacy protections of Exemption 7(C) to corporations also would frustrate the purposes of the FOIA and bar access to documents long considered to be publicly accessible. As a mandatory disclosure statute, the FOIA's nine exemptions are construed narrowly. With the enactment of Exemption 7(C), Congress understood specifically that information collected by agencies as part of their investigation into corporate misdeeds would continue to be available to the public under the FOIA. But if the decision of the Third Circuit is not overturned, that legislative intent will be thwarted and documents on a wide range of topics sought by the *amici* and others – from the BP oil spill to coal mine explosions to the corporate misdeeds of Bernard Madoff and his company – would no longer be accessible.

Agencies also routinely post investigative reports and other investigative data on agency websites even without a specific FOIA request. If the reasoning of the U.S. Court of Appeals for the Third Circuit is adopted, they will be chilled in making these kinds of affirmative disclosures, fearing a lawsuit from a corporation seeking to prevent the economic harm such disclosures purportedly may cause. Such a result would transform Exemption 7(C) from a narrow instrument facilitating transparency and accountability to a broad shield preventing the public from knowing what its government is up to.

3. Finally, accepting the Third Circuit's unprecedented interpretation of Exemption 7(C) would upset the orderly administration of the FOIA and grant corporate entities more privacy protections than the FOIA currently affords individuals. Agencies would be required to consult with corporations on any information arguably implicating corporate "privacy" interests and to implement a concept that as yet has no commonly understood meaning or parameters under the FOIA. Already lengthy delays in agency processing of FOIA requests would only grow longer, and agencies would be more likely to defer to corporate interests, given the greater financial resources corporations have to protect their asserted corporate interests.

Recognizing corporate privacy interests under Exemption 7(C) also would grant corporations greater rights and protections than individuals currently enjoy under the FOIA. Unlike corporations, which would get notice of any request for potential corporate privacy information, individuals would be afforded no notice and opportunity to weigh in, even though Congress enacted Exemption 7(C) with the specific intent of protecting individual privacy interests.

ARGUMENT

I. EXEMPTION 7(C) OF THE FOIA DOES NOT AFFORD ANY PROTECTION FOR SO-CALLED "PRIVACY" INTERESTS OF CORPORATE ENTITIES

Exemption 7(C) of the FOIA, by its express terms, protects from mandatory disclosure law enforcement records the production of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). The Third Circuit in its decision below construed the term "personal privacy" to encompass privacy rights and interests asserted on behalf of corporate entities as well as individuals. This extension of the term "personal privacy" conflicts directly with its plain language, especially when considered in the context of the FOIA as a whole and Congress' clear intent in enacting Exemption 7(C).

Because the FOIA generally defines the word "person" to include corporations, respondents argue the term "personal" in Exemption 7(C) must likewise embrace corporations. The two terms, however, are not the same and "personal" -- which is not separately defined in the FOIA -- generally is understood to pertain to an individual human being. Defined in part as "having the qualities of a person rather than a thing or abstraction,"[2] personal connotes the character or characteristics of a living person, rather than an abstract and artificial corporate entity. Beyond that, the term "personal" does not appear in isolation. Rather, it is linked in Exemption 7(C) to the word "privacy," which under "both the common law and the literal understandings of privacy encompass[es] the *individual's* control of information concerning his or her person." *U.S. Dep't of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 763 (1989) ("*Reporters Comm.*") (emphasis added). The range of "intimate personal" information recognized as falling within the protection of Exemption 7(C) – "marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, and reputation"[3] – consists of information uniquely about and concerning individuals and thus also supports the construction of "personal privacy" as applying exclusively to individuals.

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[2] *Merriam-Webster's Collegiate Dictionary*, Eleventh Edition 924 (2006).

To be sure, this Court has clarified that an individual's personal privacy protected by Exemption 7(C) is not limited only to information about that particular individual. *See Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 165 (2004). In *Favish*, disclosing gruesome photographs of a dead family member may not have revealed any private information about the decedent, but certainly would have invaded the personal privacy of living relatives by disturbing their "peace of mind and tranquility." *Id.* at 166. Accordingly, the Court concluded that Exemption 7(C) exempted those photographs from the FOIA's mandatory disclosure provisions, construing the exemption as "requir[ing] us to protect, in the proper degree, the personal privacy of citizens against the uncontrolled release of information compiled through the power of the State." *Id.* at 172.

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[3] *Washington Post Co. v. U.S. Dep't of Justice*, 863 F.2d 96, 100 (D.C. Cir. 1988).

An examination of the harms Exemption 7(C) was designed to protect against reinforces the exemption's protections as limited to individuals. Privacy is one of the qualities valued by an individual because it relates to "an individual interest in avoiding disclosure of personal matters," *Reporters Comm.*, 489 U.S. at 762,[4] and the "embarrassment and humiliation" such disclosure may cause. *See Associated Press v. U.S. Dep't of Defense*, 554 F.3d 274, 287(2d Cir. 2009). In other words, Exemption 7(C) affords protection from embarrassment and other disquieting human emotions experienced only by individuals, not inanimate corporate entities.

Exemption 6 of the FOIA shares with Exemption 7(C) this same focus on the personal privacy of individuals by permitting the withholding of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.

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[4] *See also Favish* at 764 n.16 (cataloging various definitions of "privacy" as including "'the right to control the flow of information concerning the details of one's individuality.'") (citation omitted).

§ 552(b)(6).[5] This provision long has been construed as applying uniquely to individuals in recognition of their "privacy interest in keeping personal facts away from the public eye" that are "potentially embarrassing or harmful if disclosed." *Reporters Comm.*, 489 U.S. at 749-750 (citation omitted). When Congress enacted Exemption 7(C) as part of the 1974 amendments to the FOIA, it purposefully adopted the "personal privacy" language of Exemption 6 to ensure congruency between the protections afforded by both exemptions. Senator Hart, remarking on the connection between Exemptions 6 and 7(C) and their use of the term "personal privacy," explained:

> The protection of personal privacy included in [Exemption 7] . . . is part of the sixth exemption in the present law. By adding the protective language here, we simply make clear that the protections in the sixth exemption for personal privacy also apply to disclosure under the seventh exemption. I wish to also make it clear, in case there is any doubt, that this clause is intended to protect the privacy of any person mentioned in the requested files . . .

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[5] The Privacy Act, 5 U.S.C. 552(a), also lends support for the FOIA's focus on the privacy of individuals. Enacted "largely out of concern over 'the impact of computer data banks on individual privacy,'" *Reporters Comm.*, 489 U.S. at 766 (citation omitted), the Privacy Act reflects the same "basic policy concern" as the FOIA with the repercussions on personal privacy of disseminating private information about an individual. *Id.* at 767.

House Committee on Government Operations and Senate Committee on the Judiciary, 94th Cong., 1st Sess., *Freedom of Information Act Amendments of 1974* (P.L. 93-502) ("Joint Source Book"), p. 333.[6] Thus, while the provisions differ in some material ways,[7] the nature of the protection they afford – the personal privacy of individuals – does not.

This is not to say the FOIA provides no protection for corporations, just that the nature and source of that protection differ from that for individuals and their personal privacy. Corporations, as inanimate objects, are incapable of experiencing the range of negative emotions that invasion of one's personal privacy engenders, but they nevertheless have a recognized interest in the confidentiality of business information that, if disclosed, could cause them economic harm. Exemption 4 of the FOIA protects that interest by excluding from the FOIA's mandatory disclosure requirements "trade secrets and commercial or financial information obtained from a person and privileged or confidential," 5 U.S.C. § 552(b)(4), to protect those "who submit financial or commercial data to government agencies from . . . competitive disadvantages." *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 768 (D.C. Cir. 1974).[8] As with personal privacy, protecting that confidentiality often is in tension with the FOIA's goal of providing public access to documents in agency files, but the courts have always recognized that the two interests are distinct. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979) (noting the conflict between public access to information in government files and "concerns about personal privacy and business confidentiality.").

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[6] Senator Roman Hruska also confirmed Congress' intent that the protection for "personal privacy" in Exemption 7(C) applied exclusively to individuals, a protection he deemed to be "in some respect the most important rights an individual may possess, his right to privacy and his right to personal safety." Remarks of Senator Hruska, *id.* at 342. This history confirms Congress' understanding that the personal privacy protection of Exemption 7(C) pertains only to the privacy rights of individuals, not corporate entities such as respondent AT&T.

[7] The two exemptions differ in the standard of review, not the privacy interests each affords. *Cohen v. Environmental Prot. Agency*, 575 F. Supp. 425, 429 and n.6 (D.D.C. 1983), citing *FBI v. Abramson*, 456 U.S. 615, 621 n.13 (1983).

The different treatment the FOIA affords individuals with their personal privacy interests and corporations with their business confidentiality interests flows in part from the different relationships the two have with the federal government. Unlike individuals, corporations are highly regulated entities that through a host of federal statutes are obligated to make public a wide range of information. For instance, the Securities and Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.*, requires publicly traded companies to file and make available to the public broad categories of detailed financial and operating information on a regular basis. *See generally Santa Fe Indus. v. Green*, 430 U.S. 462, 477-478 (1977) ("the Court repeatedly has described the 'fundamental purpose' of the [1934] Act as implementing a 'philosophy of full disclosure.'") (citations omitted).[9] Individuals are subject to no comparable disclosure requirements and, indeed, statutes such as the Privacy Act, 5 U.S.C. § 552(a), and the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(g), expressly protect individuals against the disclosure of personal information.

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[8] Corporate submitters of information are also protected by a wide range of statutory provisions that are given force under Exemption 3 of the FOIA, which applies to information "specifically exempted from disclosure by [other] statute," 5 U.S.C. § 552(b)(3). For example, companies voluntarily submitting information to the Department of Homeland Security detailing vulnerabilities in the "critical infrastructure" may mark such submissions as "critical infrastucture information" and thereby preclude disclosure under the FOIA. *See* 6 U.S.C. § 133.

Finally, the legislative history of Exemption 7(C) makes clear Congress quite consciously chose to protect the privacy interests of individuals but not corporations, recognizing that information in investigative files about corporate activities – even if its disclosure cast the corporation in a bad light – was precisely what the FOIA was enacted to make publicly accessible. Concerned about court decisions broadly construing Exemption 7, Congress amended the exemption in 1974 to clarify that law enforcement records were exempt only where disclosure would interfere with certain enumerated interests. Senator Hart, who introduced the amendment to Exemption 7 on behalf of himself and 14 co-sponsors, explained its necessity:

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[9] It is worth noting that the Third Circuit's rationale would also apply to the purported privacy interests of other entities, such as labor unions. *See, e.g., Seafarers Int'l Union v. U.S. Coast Guard*, 736 F.2d 19, 25 (2d Cir. 1984) ("The APA explicitly creates a cause of action for 'persons' (including unions, *see* 5 U.S.C. § 551(2) (1982)) aggrieved by agency action.") (citation omitted). Like corporations, labor unions are required to disclose a broad range of detailed information about their finances and activities. *See, e.g., AFL-CIO v. Chao*, 409 F.3d 377, 394 (D.C. Cir. 2005) (Roberts, J., concurring in part and dissenting in part) ("the whole point of the [Labor Management Reporting and Disclosure Act of 1959] is to ensure . . . broad financial disclosure") (citation omitted).

> Our concern is that, under the interpretation by the courts in recent cases, the seventh exemption will deny public access to information even previously available. For example, we fear that such information as meat inspection reports, civil rights compliance information, and medicare nursing home reports will be considered exempt under the seventh exemption.

120 Cong. Rec. 17,033 (1974) (statement of Sen. Hart), reprinted in House Committee on Government Operations, Senate Committee on the Judiciary, 94th Cong., *Freedom of Information Act & Amendments of 1974, Source Book: Legislative History, Texts, & Other Documents* (Joint Comm. Print) (1975) ("*Source Book*"). That is, Congress determined that disclosure of investigative records concerning various corporate activities lay at the core of the functioning of the FOIA as a mandatory disclosure statute and amended Exemption 7 specifically to ensure public access to such records. That purpose would be thwarted if Exemption 7(C)

were now interpreted to embrace corporate privacy interests.[10]

II. APPLYING THE PRIVACY PROTECTION OF EXEMPTION 7(C) TO CORPORATIONS WOULD UNDERMINE THE EXEMPTION'S PURPOSE AND BAR PUBLIC ACCESS TO DOCUMENTS LONG UNDERSTOOD TO BE ACCESSIBLE UNDER THE FOIA.

If allowed to stand, the decision of the Third Circuit allowing corporate entities to rely on Exemption 7(C) to protect from disclosure records that implicate their so-called "personal privacy" will undermine one of the core purposes of the FOIA. Congress designed the FOIA to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Toward that end, the

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[10] In a recent statement, Senator Patrick Leahy (D-VT) confirmed Congress' intent behind Exemption 7(C): "to shield from public disclosure sensitive personal information about individuals who may be mentioned in Government files. However, Congress never intended for this exemption to apply to corporations." As Senator Leahy explained, extending Exemption 7(C) to corporations "would close a vital window into how our Government works" by "shield[ing] from public view critical information about public health and safety, environmental dangers, and financial misconduct among other things– to the great detriment of the people's right to know and to our Democracy." Statement Of Senator Patrick Leahy (D-Vt), Chairman, Senate Judiciary Committee, On FCC v. AT&T And The Freedom of Information Act (Nov. 15, 2010). A copy of his statement is attached as an appendix.

FOIA protects the public's right to know "what their government is up to," *Reporters Comm.*, 489 U.S. at 773, by "pierc[ing] the veil of administrative secrecy" and "open[ing] agency action to the light of public scrutiny." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation omitted). Understanding how agencies oversee the spending of public tax dollars and enforce laws and regulations comprises a core purpose of the FOIA. *See U.S. Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994).

While the FOIA's nine enumerated exemptions permit federal agencies to withhold records that fall within those exemptions, they are to be construed narrowly given the FOIA's "dominant objective" of "disclosure, not secrecy . . ." *Rose*, 425 U.S. at 361. As discussed above, Congress enacted Exemption 7(C) with the specific objective of providing "protection for *personal* privacy" in law enforcement records, just as it already had protected personal privacy in other types of records under Exemption 6. 120 Cong. Rec. at 17,033 (statement of Sen. Hart) (emphasis added). Extending that protection to corporate entities would deny the public access to broad categories of records that reveal the operations of government and how it exercises its oversight of corporate activities, in contravention of the FOIA's purpose.

Recent events of national importance demonstrate how records obtained or created during government investigations into corporate activities can contain information of crucial public importance. For example, the BP oil rig explosion and resultant massive oil spill in the Gulf of Mexico – the subject of multiple FOIA requests by, among others, *amicus* CREW – already have affected hundreds of thousands of residents and businesses and prompted numerous government investigations.[11] The Department of Labor's Mine Safety and Health Administration is investigating the myriad alleged safety violations by Massey Coal and their connection to the company's West Virginia mine where an explosion claimed the lives of 29 mine workers.[12] The Securities and Exchange Commission launched multiple investigations into the $65 billion Ponzi scheme perpetrated by Bernard Madoff and his company, Bernard L. Madoff Investment Securities, LLC.[13]

The public has a strong interest in knowing how the government is responding to these crises, whether the response is adequate, and what more should be done. If companies like BP, Massey Coal, and Bernard L. Madoff Investment Securities can inject a claim of corporate privacy into an exemption designed to protect only "valid governmental and *individual* interests in confidentiality,"[14] then each time a requester seeks records under the FOIA concerning newsworthy topics like the economic downturn, oil spill, and mine explosion, delay and withholding are likely to result. If the Third Circuit's decision is not reversed, agencies will be reluctant or unwilling to release records in their investigative files that contain unfavorable facts about a corporation, fearing a lawsuit by the company seeking to protect its so-called personal privacy. Far from being an instrument for learning what our government is up to, the Third Circuit's decision, if upheld, would transform Exemption 7(C) into a shield to protect corporations' economic interests to the detriment of transparency and accountability. And it would deny access to the very kinds of records Congress intended to make publicly available under Exemption 7(C): "meat inspection reports, civil rights compliance information, and medicare nursing home reports." Source Book (statement of Sen. Hart).

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[11] *See, e.g.*, Elizabeth Shogren, *Cementing Becomes One Focus In Gulf Oil Probe*, National Public Radio (May 5, 2010), *available at* www.npr.org/templates/story/story.php?storyId=126536457.

[12] See, e.g., *Feds Launch Investigation into Mine Explosion*, CBS News (April 7, 2010), *available at* www.cbsnews.com/stories/2010/04/07/national/main6371864.shtml.

[13] *See* Securities and Exchange Commission, Office of the Inspector General, *Investigation of Failure of the SEC to Uncover Barnard Madoff's Ponzi Scheme*, Report No. OIG-509 (August 31, 2009), *available at* www.sec.gov/news/studies/2009/oig-509.pdf.

Agencies routinely release records in response to FOIA requests that under the Third Circuit's analysis could become the subjects of protracted Exemption 7(C) disputes. For example, the Environmental Protection Agency did not assert any sort of corporate privacy claim in response to a FOIA request for "notice letters" sent to corporations potentially liable for cleanup of hazardous wastes, but those letters might have been subject to withholding under the Third Circuit's novel construction of Exemption 7(C). *See Cohen v. Envtl. Prot. Agency*, 575 F. Supp. 425 (D.D.C. 1983). Likewise, in *Aguirre v. Sec. & Exch. Comm'n*, the SEC, in response to a FOIA request, released government records concerning a company's potentially unlawful trading practices, withholding under Exemption 7(C) only information that pertained to individuals. 552 F. Supp. 3d 33, 47 (D.D.C. 2008). Had a claim of corporate privacy been available, the agency might have withheld many more records that would have shown how the SEC failed to properly investigate the company. *See id.* at 56-57.

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[14] 120 Cong. Rec. at 17,033 (statement of Sen. Hart) (emphasis added).

Beyond those records made available upon request under the FOIA, government agencies affirmatively disclose substantial amounts of information through on-line postings on agency websites that could be affected by the Third Circuit's ruling. For example, the Food and Drug Administration's Office of Regulatory Affairs ("ORA"), which describes itself as having "investigators" who "enforce [food and drug safety] laws," routinely posts inspections reports[15] and warning letters to companies about legal violations,[16] subject only to Exemption 4 redactions of trade secrets and other confidential business information. These records contain information that might well cast the company in a bad light, such as the observation that a cheese manufacturer's "[p]lumbing constitutes a source of contamination to food, equipment, and utensils."[17] Similarly, the United States Department of Agriculture Food Safety and Inspection Services ("FSIS") publishes a Quarterly Enforcement Report that lists various types of enforcement proceedings and names companies that have been subject to those actions.[18] If the posting agencies had to scrub these documents of information arguably implicating vague and undefined corporate "privacy" concerns, the public usefulness of the documents would be significantly reduced.

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[15] *See* ORA, Electronic Reading Room, http://www.Ida.gov/AboutFDA/CentersOffices/ORA/ORAElectronicReadingRoom/defalut.htm.

[16] *See* FDA, Warning Letters, www.ida.gov/ICECI/EnforcementActions/WarningLetters/default.htm.

Even if a court victory might eventually provide public access to these types of records, for requesters without the resources to pursue administrative appeals and litigation, an agency's initial denial effectively would be a final denial.[19] Further, the delay attendant to litigation likely would render much of the information stale and of limited utility, given the years that litigation typically consumes. In the end, even if a requester successfully litigates an Exemption 7(C) claim of corporate privacy, the agency's initial denial would still result in greater expense for both the agency and requester, and would delay release of important records Congress never intended to protect from disclosure.

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[17] Inspection report for Quesos Mi Pueblino, LLC, available at www.fida.gov/downloads/AboutFDA/CentersOffices/ORA/ORAElectronicReadingRoom/UCM198180.pdf.

[18] *See* FSIS, Quarterly Enforcement Reports, www.fsis.usda.gov/regulations_&_policies/Quarterly_Enforcement_Reports/index.asp.

[19] As this case demonstrates, even where the agency rejects a claim of corporate privacy and determines to disclose the requested records, a requester may still be obligated to defend against a "reverse-FOIA" suit brought by the corporation asserting a "privacy" interest.

III. ACCEPTING THE THIRD CIRCUIT'S INTERPRETATION OF EXEMPTION 7(C) WOULD UPSET THE ORDERLY ADMINISTRATION OF THE FOIA AND AFFORD CORPORATE ENTITIES MORE PRIVACY PROTECTIONS THAN INDIVIDUALS ENJOY.

The unprecedented ruling of the Third Circuit threatens to upset the orderly administration of the FOIA by imposing enormous administrative burdens on agencies and lengthening the already significant delay in providing requesters access to documents under the FOIA. Agencies likely would be required to expand the consultative process between an agency and a corporate submitter of information to include not only confidential business information, but any information in an agency's investigative files that arguably has some impact on corporate "privacy." *See* Executive Order 12600, "Predisclosure Notification Procedures for Confidential Commercial Information," 52 Fed. Reg. 23781 (June 25, 1987) (requiring agencies to notify "submitters of records containing confidential commercial information" when such records are sought under the FOIA, and to establish procedures for the receipt and consideration of submitter objections to disclosure); 47 C.F.R. § 0.461(d)(3)

(FCC regulation implementing the notification requirement). Corporate submitters of material they designate as "confidential commercial information" to protect its disclosure under Exemption 4 will have a new adversarial leg to stand on when the agency determines the disputed information is not entitled to Exemption 4's protection. Indeed, this case arose when the Commission notified AT&T of CompTel's FOIA request and AT&T objected to disclosure. C.A. App. A28. Determining what information might be protected on privacy grounds – as opposed to the "confidential commercial" standard of Exemption 4 – is of no small moment, as there are no standards to apply in determining what constitutes corporate privacy under the FOIA. Establishing a new consultative process and determining how to assess claims of corporate privacy would consume scarce agency resources, with the predictable result that far fewer documents would be publicly available.

Implementing the Third Circuit's opinion also would increase the inherent imbalance that already exists in the FOIA between individual requesters, who typically have limited resources, and corporate submitters, with their much deeper pockets to challenge disclosure of information they deem damaging to corporate interests. In this conflict, agencies would be more likely to defer to corporate claims of privacy, viewing corporations as the more likely litigants in a dispute over whether Exemption 7(C) applies. In either case, agencies would be required to expend ever diminishing resources and all requesters would face even longer processing delays.

Finally, recognizing corporate privacy interests under Exemption 7(C) would grant corporations greater rights and protections than individuals currently enjoy under the FOIA. Under the submitter notification requirements mandated by Executive Order 12600 and implementing agency regulations, corporate submitters receive notice of any request for potential corporate privacy information and be afforded an opportunity to object to disclosure citing Exemption 7(C) as well as Exemption 4. Corporate submitters have the opportunity – as this case demonstrates – to initiate a "reverse FOIA" suit to bar disclosure. By contrast, individuals whose personal privacy information is requested from an agency's investigative files are not entitled to such notice or an opportunity, either before the agency or a court, to weigh in on whether or not their information should be withheld under Exemption 7(C). As a result, individuals would receive less protection for their privacy interests than corporate entities, even though it is individuals, not corporate entities, that fall within the ambit of those Congress intended to include when it enacted Exemption 7(C).

CONCLUSION

The Court should reject the Third Circuit's interpretation of Exemption 7(C) as protecting the privacy of corporate entities.

Respectfully Submitted,

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Dated: November 16, 2010

APPENDIX

Statement Of Senator Patrick Leahy (D-Vt.), Chairman, Senate Judiciary Committee, On *FCC v. AT&T* And The Freedom Of Information Act

November 15, 2010

MR. PRESIDENT. In the coming months, the Supreme Court of the United States will consider *Federal Communications Commission v. AT&T* -- a monumental Freedom of Information Act (FOIA) case that could vastly expand the rights of corporations to shield their activities from public view. Like many Americans who deeply value openness, transparency and accountability in our Government, I urge the Court to reject efforts to broaden the personal privacy exemption to FOIA to include corporate information.

A decade after Congress first enacted the Freedom of Information Act, Congress created an exemption to this law for law enforcement records that contain sensitive personal information. The so-called "personal privacy exemption" for law enforcement records -- FOIA Exemption 7 (C) -- allows the Government to withhold information contained in its investigatory files that "*could reasonably be expected to constitute an unwarranted invasion of personal privacy.*"

By creating this exemption, Congress intended to shield from public disclosure sensitive personal information about individuals who may be mentioned in Government files. However, Congress never intended for this exemption to apply to corporations.

The legislative history for the personal privacy exemption makes clear that Congress intended for this exemption to protect an individual's right to privacy. Indeed, when the Senate debated this exemption in May of 1974, Senator Philip Hart, who drafted the personal privacy exemption, remarked that "*the protection for personal privacy included in [the exemption] . . . is part of the sixth exemption [to FOIA] in the present law. By adding the protective language here, we simply make clear that the protections in the sixth exemption for personal privacy also apply to disclosure under the seventh exemption. I wish to also make it clear, in case there is any doubt, that this clause is intended to protect the privacy of any person mentioned in the requested files, and not only the person who is the object of the investigation.*" *See House Committee on Government Operations & Senate Committee on the Judiciary, 94th Cong., 1st Sess., Freedom of Information Act Amendments of 1974 (P.L. 93-502) ("Joint Source Book"), page 333 (emphasis supplied).*

Former Senator Roman Hruska also confirmed that Congress intended for the exemption to address individual privacy rights. Regarding the personal privacy exemption, he said "*we are dealing in this matter with what I believe to be the most important rights, and in some respect the most important rights, an individual may possess, his right to privacy, and his right to personal safety.*" *See, Remarks of Senators Hruska, Id.* at 342. The universal understanding that the personal privacy exemption pertains only to the privacy rights of individuals is further confirmed by the remarks of former Senator Strom Thurmond, who noted during the Senate debate that *"[a]ll of us are aware of the general feeling permeating the country, that our citizens want to know what their Government is doing . . . However, by the same token, we are also concerned about a mutual problem of invasion of an individual's privacy." See Remarks of Senator Thurmond, Id at 342.*

During the more than four decades since the Congress enacted the personal privacy exemption to FOIA, our Federal courts and Federal agencies have consistently interpreted this exemption to apply only to individuals. Over the years, the Congress -- with the full knowledge of how the courts have interpreted this exemption -- has never amended this exemption, nor called into question the universally held view that the exemption protects the personal privacy rights of individuals.

Given the clear legislative history and the longstanding case precedent in this area, I am deeply troubled by recent efforts to vastly -- and I believe improperly -- expand the scope of this exemption to reach corporations. While I do not quibble with the notion that certain corporate information should be exempt from public disclosure, I firmly believe that Congress has provided meaningful and adequate protections for sensitive corporate information in other parts of FOIA. Indeed, Congress specifically enacted FOIA Exemption 4 to protect trade secrets and other sensitive corporate information from public disclosure. Tellingly, American corporations have successfully relied upon Exemption 4 for decades, to safeguard their sensitive business information when it is shared with the Government.

I fear that vastly expanding the personal privacy exemption for law enforcement records would close a vital window into how our Government works. I also fear that extending this exemption to corporations would permit corporations to shield from public view critical information about public health and safety, environmental dangers, and financial misconduct, among other things -- to the great detriment of the people's right to know and to our Democracy.

As Senator Hart wisely noted during the debate of the 1974 FOIA Amendments, "*survival for a society such as ours hinges very importantly on the access that a citizen can have to the performance of those he has hired.*" *Id.* at 346. I sincerely hope that our Nation's highest Court will carefully consider these words and that the Court will narrowly construe the personal privacy exemption, consistent with Congressional intent. Should the Court decide to do otherwise, I will work with others in the Congress to ensure that FOIA, and specifically the personal privacy exemption for law enforcement records, remains a meaningful safeguard for the American people's right to know.

AMICUS
CURIAE
BRIEF

Supreme Court, U.S.
FILED

NOV 16 2010

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No. 09-1279

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION,
ET AL.,
Petitioners,

v.

AT&T INC., *ET AL.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

BRIEF OF COLLABORATION ON GOVERNMENT SECRECY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Privacy, Personhood and the Courts: FOIA Exemption 7(C) in Context, 120 Yale L.J. 379 (2010) 12

INTEREST OF *AMICUS CURIAE*[1]

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[1]. The parties have consented to the filing of this brief, and counsel of record for all parties received advance notice of *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus* or its counsel made a monetary contribution to its preparation or submission. *Amicus* wishes to thank CGS Senior Research Assistant LaToya D. Rembert-Lang for her research assistance.

Freedom of Information Act decisions issued by the Court, can be accessed at http://www.wcl.american.edu/lawandgov/cgs/.

SUMMARY OF ARGUMENT

Although this case arose from an unusual procedural posture,[2] it stands as representative of the many thousands of instances annually in which federal agencies must determine whether – and if so, to exactly what extent – to apply Exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(4), to the commercial information that is obtained by them for regulatory, procurement, and law enforcement purposes. And this major part of governmentwide FOIA administration is all the more significant in that animates the realm of "reverse FOIA," in which agency FOIA personnel deal with "business submitters" directly, when those entities' submitted information is requested under the FOIA, in accordance with Executive Order 12,600, 3 C.F.R. 235 (1988), *reprinted in* 5 U.S.C. § 552 note (2006 & Supp. III 2009).

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[2] Notably, this case came to the Court of Appeals below not as Freedom of Information Act cases ordinarily do, i.e., with the benefit of briefing and adjudication first at the district court level. *See AT&T Inc. v. FCC*, 582 F.3d 490, 496 (3d Cir. 2009) ("Thus, we exercise plenary review . . . ."). Suffice to say here that one consequence of this might be what now is presented to this Court. *See also* Part I.C., *infra*.

The fact that the Third Circuit's notion of "corporate privacy" would so greatly distort this realm of administrative law and practice comports with how deeply flawed it is. There is absolutely no sound basis for its radical departure from the decades-long understanding of "personal privacy" under Exemptions 6 and 7(C) of the FOIA, 5 U.S.C. § 552(b)(6), 7(C) – not in the statute's language, not in the teachings about "privacy" in this Court's prior FOIA decisions, and certainly not in the Third Circuit's reasoning itself. In short, this bid to extend the FOIA's "personal privacy" protections to entities other than individuals is, colloquially speaking, about as meritless as they come.

ARGUMENT

I. THERE IS NO SOUND BASIS FOR ADOPTING THE NOTION OF "CORPORATE PRIVACY" FOR IMPLEMENTATION OF THE FOIA'S PERSONAL PRIVACY EXEMPTIONS

A. The Statutory Language Plainly Compels Reversal

The question of statutory construction presented in this case is relatively simple: Did Congress, when it enacted the FOIA in 1966, intend to provide "privacy" protection, under Exemption 6, to anything other than individuals? To be sure, this case most directly involves the Act's Exemption 7(C), which was created in 1974 and amended considerably in 1986, but there is no good reason in logic or law why the answer would be any different under that exemption. *Accord U.S. Dep't of Justice v. Reporters*

Comm. for Freedom of the Press, 489 U.S. 749, 767-69 (1989) (discussing both privacy exemptions together, in applying *Department of the Air Force v. Rose*, 425 U.S. 352, 373-77, 380-81 (1976)); *see also* Part 1.C., *infra*. So the question ought to be one in the same.

The statutory words to be construed in answering that question are primarily the words "privacy," "personal," "person," and "individual." And to that must be added the phrase "personal privacy" as a combination of the first two. None of them, properly construed and applied, supports the Third Circuit's notion that "corporate privacy" exists within the Freedom of Information Act. *Accord U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 601 (1982) (construing the word "similar" within Exemption 6 by reasoning that "[i]t strains the normal meaning of the word" to read it as the lower court did).

The Act uses the phrase "personal privacy" in each of its two privacy exemptions, identically so, and also in the part of its "reading room" provision that authorizes agencies to achieve privacy protection in that context as well. *See* 5 U.S.C. § 552(a)(2) (authorizing agencies most specifically to "prevent a clearly unwarranted invasion of personal privacy [by] delet[ing] identifying details" when they comply with their automatic disclosure obligations under the Act).[3] It uses the word "person" numerous times to refer to FOIA requesters, *see, e.g.*, 5 U.S.C. § 552(a)(6)(A)(i) ("the person making such request"), and also within two of its other exemptions, Exemption 4 and Exemption 7(B). And it uses the word "individual" within another exemption, Exemption 7(F).[4]

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[3] *See also Reporters Comm.*, 489 U.S. at 755 n.7; *cf. Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 n.21 (1975) (revealing redundancy of such protection

These latter three FOIA exemptions, of course, pertain to matters other than personal privacy. The first, Exemption 4, 5 U.S.C. § 552(b)(4), pertains to commercial and financial information. The second, Exemption 7(B), 5 U.S.C. § 552(b)(7)(B), pertains to law enforcement information the disclosure of which has "fair trial" significance. And the third, Exemption 7(F), 5 U.S.C. § 552(b)(7)(F), pertains to law enforcement information that has "life or physical safety" significance.

What this amounts to is the following: In enacting and then amending the FOIA, Congress used the word "person" (in 1966 and 1974) whenever it was referring to any interested party that could be making a FOIA request, to any interested party from whom an agency could obtain sensitive business information, and to any interested party that might

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due to general FOIA exemption applicability within subsection (a)(2) just as within subsection (a)(3)).

[4] Likewise, as amended in 1996, the Act employs the word "individual" in much the same way when defining "compelling need" for purposes of affording "expedited processing" under one of its procedural provisions, found at 5 U.S.C. § 552(a)(6)(E)(v)(I).

have protectable "fair trial" rights.[5] It used the word "individual" (in 1986) when referring to any interested party whose "life or physical safety" could be at stake in the disclosure of requested information.[6] And it used the term "personal privacy" (in 1966, 1974, and as reiterated in 1986) when addressing the protection of privacy interests.

There is nothing about this statutory scheme that is odd or unordinary in the least. Each ambit of the statute described above, as well as the particular words chosen by Congress to be employed within it, makes perfect sense both within itself and within the statute as a whole. Simply put, the notion that the protection of "corporate privacy" interests somehow derives from the Act's structure is nothing more than that.

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[5] Exemption 7(B), by its nature, provides protection to corporations subject to judicial proceedings, as well as to individuals. *See, e.g., Wash. Post Co. v. U.S. Dep't of Justice*, 863 F.2d 96, 101-03 (D.C. Cir. 1988) (applying Exemption 7(B) in case of pharmaceutical company facing personal injury suits).

[6] Exemption 7(F) of the FOIA was created in 1974 when Congress divided Exemption 7 into six subparts, but like nearly all other of those subparts it was itself significantly amended in 1986. *See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act* 9-18 (Dec. 1987) (explicating entirety of amendments made to Exemption 7, inter alia), *available at* http://www.justice.gov/oip/86agmemo.htm. Originally, it provided exceptionally strong exemption protection but "was limited in scope so as to protect the lives and physical safety of 'law enforcement personnel' only." *Id.* at 18. As amended in 1986, it provides broader protection by covering law enforcement information the disclosure of which "could reasonably be expected to endanger the life or physical safety of *any individual*." 5 U.S.C. § 552(b)(7)(F), *as amended by* Pub. L. No. 99-570, § 1802 (1986) (emphasis added).

Significantly, there also is another segment of exemption language in the Act that logically must be considered here, the "threshold" language of Exemption 6. The FOIA as amended contains several "threshold requirements" in its exemptions. Four consecutive exemptions – Exemptions 4, 5, 6, and 7 – require that a certain threshold be satisfied before the body of their protective elements can be reached. *See* 5 U.S.C. § 552(b)(4) (requiring, non-sequentially, that the information be "obtained from a person"); 5 U.S.C. § 552(b)(5) (requiring, both stiltedly and archaically, that privileged information first be "inter-agency or intra-agency memorandums or letters"); 5 U.S.C. § 552(b)(7) (requiring, more modernly, that requested material be "records or information compiled for law enforcement purposes" before exemption subparts can be employed). *See, e.g., Dep't of the Interior v. Klamath Water Users Protective Ass'n,* 532 U.S. 1, 8-16 (2001) (discussing Exemption 5 threshold); *FBI v. Abramson,* 456 U.S. 615, 621-32 (1982) (same as to Exemption 7).[7]

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[7] The Act contains one additional "threshold requirement," which is found within a subpart of Exemption 7 itself. *See* 5 U.S.C. § 552(b)(7)(D) (providing that, "in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation," the agency may withhold all "information furnished by a confidential source").

And when Congress established "personal privacy" as a basis for exemption protection, in Exemption 6 in 1966, it likewise created a threshold requirement to be met before any matter of "privacy" could be considered under it. Specifically, it required that the record or information first be part of a "personnel[,] medical[, or] similar file[ ]." 5 U.S.C. § 552(b)(6). This fact, as much as any other, speaks to the statutory construction question presented in this case, under both of the FOIA's privacy exemptions.

Briefly stated, one must carefully consider the body of Exemption 6 together with its legislated threshold. In other words, and beyond anything else, does it make any sense that in 1966 Congress intended the "privacy" that it was protecting in the Act to transcend the scope of that which is implicated in personnel files, medical files, and "similar files"? Those files unquestionably contain information about individuals and do not typically contain information about corporations, associations, or other non-individuals. And they certainly do not encompass the types of government files that do, as a threshold matter, contain information pertaining to (and often submitted by) such entities. So if Congress's fundamental conception of "privacy" in enacting the FOIA were as respondent maintains (even putting aside use of the word "personal"), then Congress did an extremely poor job of effectuating it.[8]

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[8] For instance, the file that contains the information at issue here is not a medical file, personnel file, or a file at all similar to such files. Rather, it is something of an altogether

Moreover, the fact that both the recordkeeping world and the FOIA changed thereafter, to the point at which the unit of focus evolved from "file," to

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different type, which happens to be a law enforcement file. That file would have fallen within the broad "law enforcement files" version of Exemption 7 under the FOIA as originally enacted, which is akin to saying that the information contained within it meets the threshold requirement of Exemption 7 in its amended form today, but the information at issue within it would have been protected then because of its general law enforcement connection, not because of its particular "privacy" character. *See FOIA Update*, Vol. III, No. 4, at 5 (observing, as long ago as September 1982, that "[i]t is well settled that the FOIA's privacy exemptions [i.e., both Exemptions 6 and 7(C)] provide personal privacy protection and cannot be invoked to protect the interests of a corporation or association"), *available at* http://www.justice.gov/oip/foia_updates/Vol_III_4/page7.htm; *see also, e.g., Wash. Post Co. v. U.S. Dep't of Justice*, 863 F.2d at 103 (observing that "[i]nformation relating to business judgments and relationships does not qualify for" Exemption 7(C)); *Aguirre v. SEC*, 551 F. Supp. 2d 33, 57 (D.D.C. 2008) (observing that "there is a clear distinction between one's business dealings, which obviously have an affect [sic] on one's personal finances, and financial information that is inherently personal in nature"); *Hodes v. HUD*, 532 F. Supp. 2d 108, 119 (D.D.C. 2008) (observing that "only individuals (not commercial entities) may possess protectable privacy interests under Exemption 6"); *Cohen v. EPA*, 575 F. Supp. 425, 429 (D.D.C. 1983) (observing that Exemption 7(C) "does not apply to information regarding professional or business activities"). And by the same token the wealth of information that is obtained by federal agencies in a non-law enforcement connection – during routine procurement processes or for a host of regulatory purposes – would have been exempt or not for reasons other than any notional "privacy" character. In short, it would have fallen plainly outside of Exemptions 6 and 7 due to their thresholds and within Exemption 4 (or not) instead. *See also* note 22, *infra*.

"record," to "information," makes no difference here.[9] Nor does it alter the analysis that this Court subsequently, in *Washington Post*, pragmatically construed Exemption 6's threshold in such a way as to broaden it. It did so, most significantly, so as to have it be satisfied by any information about any "particular individual." 456 U.S. at 601-02; *accord Whalen v. Roe*, 429 U.S. 589, 598-600 (1977) ("The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the *individual interest* in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.") (emphasis added) (footnotes omitted).

Thus, there are multiple paths for analyzing the statutory terms of the FOIA in order to decide this case, but they lead to the same conclusion: None of these terms, either in itself or when read in comparison with others, does anything other than compel reversal of the Third Circuit's singularly aberrant decision.[10]

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[9] Congress embraced the word "information" for the FOIA when it effectively codified the Court's *Abramson* decision as part of the 1986 amendments to the Act. *See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act* 5 (Dec. 1987) (pointing out that amendment to Exemption 7's threshold language followed Court's use of phrase "kind of information" in *Abramson* (citing 456 U.S. at 626)), *available at* http://www.justice.gov/oip/86agmemo.htm; *see also* 5 U.S.C. § 552(f)(2) (2000) (establishing through the 1996 FOIA amendments that the term "'record' . . . includes any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format").

B. This Court's Treatment of the Privacy Concept in its FOIA Decisions Stands Against the "Corporate Privacy" Notion

This Court has considered the Freedom of Information Act's privacy exemptions, and the nature of personal privacy under them, on six major occasions.[11] In so doing, it has spoken to privacy matters at considerable length and its teachings already point to the resolution of the question presented in this seventh one.

In the first of these cases, *Department of the Air Force v. Rose*, the Court consistently spoke of privacy as a right adhering to an "individual," rather than to the broader, legalistic term "person." *See, e.g.*, 425 U.S. at 372 ("Congress sought to construct an exemption that would require a balancing of the individual's right of privacy . . . ."). So, too, did the Court in *United States Department of State v. Ray*, 502 U.S. 164, 175 (1991), an Exemption 6 case in which it reiterated that, "[a]s we held in *Rose*, the text of the exemption requires the Court to balance 'the individual's right of privacy.'" In *United States Department of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 500 (1994), another case involving Exemption 6, the Court spoke likewise of "[a]n individual's interest in controlling the dissemination of information regarding personal matters."[12] And the Court's opinion in the major Exemption 6 case of *United States Department of State v. Washington Post Co.*, 456 U.S. 595, 599-02 (1982), is replete with focus on the privacy of "the individual" – more specifically, the "any particular individual" whose identification in FOIA-requested information logically triggers possible exemption protection.[13]

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[10] As for the legislative history that sheds further light on these bare statutory terms, no doubt it will be fully identified and explicated by the parties and other amici in this case.

[11] These six decisions, in reverse chronological order, are: *National Archives & Records Administration v. Favish*, 541 U.S. 157 (2004), *United States Department of Defense v. Federal Labor Relations Authority*, 510 U.S. 487 (1994), *United States Department of State v. Ray*, 502 U.S. 164 (1991), *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), *United States Department of State v. Washington Post Co.*, 456 U.S. 595 (1982), and *Department of the Air Force v. Rose*, 425 U.S. 352 (1976). *See also Bibles v. Or. Natural Desert Ass'n*, 519 U.S. 355 (1997) (per curiam) (reversing Exemption 6 decision summarily); *FBI v. Abramson*, 456 U.S. 615 (1982) (dealing with privacy concerns in context of threshold Exemption 7 issue).

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[12] Most significantly, the Court had occasion in *DOD v. FLRA* to emphasize that the privacy principles enunciated by it in *Reporters Committee*, a case arising under Exemption 7(C), apply under Exemption 6 as well: "The privacy interest protected by Exemption 6 'encompass[es] the individual's control of information concerning *his or her person*.'" 510 U.S. at 500 (quoting *Reporters Committee*, 489 U.S. at 763) (emphasis added). This passage brings up yet another form of the word "person" here: The fundamental concept of "personhood." *See, e.g.*, Note, *Privacy, Personhood and the Courts: FOIA Exemption 7(C) in Context*, 120 Yale L.J. 379 (2010) (analyzing issue also in relation to *Citizens United v. FEC*, 130 S. Ct. 876 (2010)). It is one more reason why the "plain text" seized upon by the Court of Appeals below (see Part I.C., *infra*) is not quite as "plain" as it would have it be.

More recently, in the Exemption 7(C) case of *National Archives & Records Administration v. Favish*, 541 U.S. 157, 167 (2004), the Court actually construed (or at least specifically applied) the phrase "personal privacy," finding that it was deeply personal in nature: "[W]e think it proper to conclude from Congress' use of the term 'personal privacy' that it intended to permit family members to assert their own privacy rights" in records about a deceased loved one. While the particular records involved in *Favish* were highly personal ones to be sure, this view of "personal privacy" stands as a far cry from how the Third Circuit concluded it could be "plainly" viewed.

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[13] Moreover, in *Washington Post* the Court assayed some of the legislative history that the Third Circuit eschewed, finding as follows:

> The House and Senate Reports, although not defining the phrase "similar files," suggest that Congress' primary purpose in enacting Exemption 6 was to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information. After referring to the "great quantities of [Federal Government] files containing intimate details about millions of citizens," the House Report explains that the exemption is "general" in nature, and *seeks to protect individuals* . . . .

456 U.S. at 599 (emphasis added).

Most significantly of all, in its landmark FOIA privacy decision, *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), the Court spoke of "the sort of 'personal privacy' interest that Congress intended Exemption 7(C) to protect," *id.* at 762, as one seemingly irreconcilable with the novel "corporate privacy" conception that is espoused here. It repeatedly emphasized, as a privacy touchstone, "the individual's right to control" information about him- or herself. *See id.* at 763, 764 n.16 (quoting authorities). It made clear that "privacy" under the FOIA is "not the same" as in tort law or in matters of constitutional law. *Id.* at 762 n.13. And it enshrined for FOIA purposes "both the common law and the literal understandings of privacy," *id.* at 763, which hardly encompass any notion of "corporate privacy" within them.

In sum, nothing in the Court's discussions, analyses, and teachings about "personal privacy," in an array of decisions under both Exemptions 6 and 7(C), supports the adoption of "corporate privacy" here. To the contrary, this Court's jurisprudence stands in the way.

C. The Decision Below Itself Provides No Sound Support for Affirmance

This is not a case in which the reasoning of the Court of Appeals' decision below provides a sound basis for its own affirmance. Rather, the Third Circuit reached its "corporate privacy" conclusion in a fashion that was transparently outcome-determinative, with reasoning flawed at every turn.

First, the Court of Appeals strained badly and quite obviously to treat its analysis as one untethered from, inter alia, the FOIA's rich vein of legislative history. This Court, of course, has drawn upon that to strong effect in its analyses of several questions raised under the Act. *See, e.g.*, *Washington Post*, 456 U.S. at 599-602; *Abramson*, 456 U.S. at 626-31. But the Third Circuit simply posited, at the outset of its analysis, that in this case "the plain text of Exemption 7(C)" is "unambiguous" and that therefore, in conclusion: "We need not consider the parties' arguments concerning statutory purpose, relevant (but non-binding) case law, and legislative history." 582 F.3d at 498 & n.7. In between, it used its self-indulgent myopia to conclude that "the FOIA's text unambiguously indicates" that "corporate privacy" exists within Exemption 7(C).[14]

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[14] The circularity of the Third Circuit's reasoning is most evident when one considers that it employed its "unambiguous/plain text" approach toward a conclusion without first construing the full "plain text" of the phrase actually at issue. This Court has had occasion to comment on the purpose that can underlie such an approach, as well as its deficiencies: "[P]lain meaning, like beauty, is sometimes in the eye of the beholder. The court below inferred 'plain meaning' without consulting indicia of congressional intent in the legislative history . . . ." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 737 (1985); *see also Abramson*, 456 U.S. at 625 n.7 ("'The notion that, because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification.'"

Second, there is the fact that the Third Circuit reached its tautological conclusion by looking at the "plain text" of Exemption 7(C) in relation to that of a broader statute. Indeed, its reference to a definition of the word "person," as a basis for divining the "unambiguous" meaning of the phrase "personal privacy," is not as it says it is: "FOIA defines 'person' to include a corporation." 582 F.3d at 497; *see also id.* at 496 ("FOIA does not define 'personal,' but it does define 'person'"). Rather, it is to the "person" definition that is contained within the Administrative Procedure Act, 5 U.S.C. § 551(2) (2006 & Supp. III 2009), which of course defines that word so as to include parties who can sue the federal government, just as the FOIA uses the same word consistently to refer to those who can make FOIA requests. The Third Circuit not only mistook the location of that definition, it plainly misapprehended its import as well.[15]

Third, and quite fundamental, is the Third Circuit's very leap from the word "person" to the word "personal," as if they can be nothing more than

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(quoting *United States v. Monia*, 317 U.S. 424, 431 (1943) (Frankfurter, J., dissenting))).

[15] It also should not be overlooked in this regard that the Third Circuit inexplicably relied on the definition of "person" contained in the broader but distinct Administrative Procedure Act without even recognizing that that word appears within the text of the FOIA itself as part of the threshold requirement of Exemption 4. *See* 582 F.3d at 496-97. It therefore did not attempt to reason that Congress has used that word to apply to business entities for FOIA purposes directly. Had it done so, however, its reasoning still would have been fatally flawed in all other respects.

two forms of the same thing. 582 F.3d at 497 ("After all, 'personal' is the adjectival form of 'person,' . . ."). Even putting aside that this reasoning is highly questionable and as such breaches the Third Circuit's own "unambiguously" threshold, it proceeds as if only the word "person" is there to be construed (and to be found "unambiguous") in this case. *See id.* (speaking tellingly of "the root from which the statutory *word* at issue is derived") (emphasis added); *cf. Favish,* 541 U.S. at 166 (rejecting comparable effort to "rely on the modifier 'personal' before the word 'privacy'" within Exemption 7(C)). Thus, the actual, commonplace phrase "personal privacy" remained largely unconstrued below, in accordance with the Third Circuit's necessary implication that it must be "unambiguous."[16]

Fourth, the Third Circuit badly erred in reasoning that "*Congress knew* how to refer solely to human beings (to the exclusion of corporations and other legal entities) when it wanted to." 582 F.3d at 497 (emphasis added). Its "example" of this is Congress's use of the word "individual" in Exemption 7(F). *See id.* But as is detailed in Part I.A., *supra,* Congress did not use the word "individual" anywhere in the FOIA when it first crafted the Act's scope of privacy protection in 1966. Nor did it use it even when it divided Exemption 7 into subparts, including its privacy counterpart to Exemption 6, in 1974. Actually, the word "individual" came into use

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[16] This critical point having been made here, this *amicus* will leave it to others to address how the distinct phrase "personal privacy" is commonly used and understood as a whole.

only as of 1986, when Exemption 7(F) was amended. That subsequent use then says absolutely nothing about what "Congress knew" how to do in 1966 when first employing the phrase "personal privacy," or in 1974 when replicating it.[17] Thus, this underpinning of the Third Circuit's reasoning (actually more a rationale in search of a reality-based underpinning) was manifestly flawed.

Lastly, there is the Third Circuit's attempt to deal with the fact that Exemption 6 uses the same key "personal privacy" phrase as Exemption 7(C). *See* 582 F.3d at 497 (speaking of the "FOIA's other uses of the phrase 'personal privacy'"). It posits, in effect, that this key phrase does "encompass[ ] corporations," but that, as it sees it, "[t]he phrase 'personnel and medical files' serves [the] function [of] limit[ing] Exemption 6 to individuals." *Id.* Even beyond the fact that such an analysis posits its own conclusion, this makes little sense, as it is asks this Court to believe that Congress *sub silentio* created yet disallowed a "corporate privacy" concept when crafting Exemption 6. And (though less explicitly on the face of the Third Circuit's opinion) it asks one to imagine that Congress just as silently embraced this novel concept when creating Exemption 7(C) in 1974 – and that this is "unambiguous" on the face of the Act's "plain text." Hardly so.[18]

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[17] As the Attorney General Memorandum on these amendments explains: "The expansion of this exemption's protective scope to encompass 'any individual' is obviously designed to ensure that no law enforcement information that could endanger anyone if disclosed under the FOIA should ever be required to be released." *Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act* 18 (Dec. 1987), *available at* http://www.justice.gov/oip/86agmemo.htm. There is absolutely no basis for thinking that anything done by Congress in amending the FOIA supports the notion of "corporate privacy." *See also id., passim.*

II. AS A PRACTICAL MATTER AS WELL, ADOPTION OF THE "CORPORATE PRIVACY" NOTION WOULD BE UNWISE AND UNWARRANTED

Beyond the purely legal merits of an issue presented to this Court in a Freedom of Information Act case, nearly every FOIA question accepted for review by it holds strong import for the effective governmentwide administration of the Act as a day-to-day practical matter. This is particularly so in this case, and should be considered as such, as the question of "corporate privacy" is a dangerously novel one that threatens to turn FOIA administration on its head. *Cf. Favish*, 541 U.S. at 170 ("The statutory scheme must be understood, moreover, in light of the consequences that would follow were we to adopt [respondent's] position.").

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[18] As this Court phrased such a reaction in its only "business information" decision under the FOIA to date, *Chrysler Corp. v. Brown*, 441 U.S. 281, 291 (1979): "In fact, that conclusion is not supported by the language, logic, or history of the Act." *See also Abramson*, 456 U.S. at 625 ("Moreover, [our] construction of the statute[,] rather than the interpretation embraced by the Court of Appeals, more accurately reflects the intention of Congress, is more consistent with the structure of the Act, and more fully serves the purposes of the statute.") (footnote omitted); *cf. Washington Post*, 456 at 600 ("there surely would be clear suggestions in the legislative history that such a [remarkable] meaning was intended").

Indeed, it necessarily holds broad implications for how more than 5000 FOIA personnel throughout the ninety-five departments and agencies of the executive branch must act on the tens of thousands of FOIA requests received each year for files and records that contain information obtained from corporations, associations, unincorporated business entities, and other "non-individuals" – in short, from any legal "person." Since the issuance the Court's seminal decision in *Chrysler Corp. v. Brown* more than thirty years ago, all federal agencies have labored to follow strict procedures by which "business submitters" demonstrate the applicability of Exemption 4 (or not) before a FOIA request is fulfilled. *Accord* Exec. Order No. 12,600 (effective June 23, 1987).[19] Agencies do so within the onerous realm of "reverse FOIA," in which their failure to comply correctly with such procedures, including through the time-consuming preparation of an adequate administrative record of their Exemption 4 determinations in the face of "business submitter" claims, subjects them to court orders enjoining disclosure, sometimes permanently. *See, e.g., McDonnell Douglas Corp. v. NASA*, 895 F. Supp. 316,

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[19] This executive order was preceded by governmentwide policy and practice to the same effect. *See, e.g.*, *FOIA Update*, Vol. III, No. 3, at 3 ("OIP Guidance: Submitters' Rights") (setting forth pre-executive order governmentwide policy guidance and describing post-*Chrysler* administrative practice), *available at* http://www.justice.gov/oip/foia_updates/Vol_III_3 /page3.htm.

319 (D.D.C. 1995) (confirming issuance of permanent injunction), *aff'd on procedural grounds*, No. 95-5290 (D.C. Cir. Sept. 17, 1996).

As it is, this means that federal agencies rarely if ever manage to comply with the Act's time limits, and the public interest is thwarted, whenever a business entity (upon receiving the notice required by Executive Order 12,600) objects to disclosure. But if the scope of those objections were to be extended beyond Exemption 4 concerns to those arguably implicated by the Act privacy exemptions, the practical difficulties posed within the "reverse FOIA" realm would be both greater and wider, with "business submitters" newly free (and for the first time encouraged) to resist disclosure through amorphous "privacy" claims. It takes little imagination to do so, nor to envision the very ease with which agencies, FOIA requesters, and the public interest overall could routinely be thwarted in such event. *Compare, e.g.*, *Favish*, 541 U.S. at 171 (reasoning dispositively under Exemption 7(C) that "[a]llegations . . . are '"easy to allege . . ."'" quoting *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998)).

In sum, on several occasions over the years, at the Solicitor General's urging in the sparing exercise of her judgment that remedial review was absolutely necessary, this Court has had to reverse a novel court of appeals decision that was utterly impracticable for purposes of governmentwide FOIA administration as well as lacking in legal merit. It did so in *Abramson*, in *Washington Post*, in *CIA v.*

Sims,[20] and most prominently in *Reporters Committee.*[21] And this case deserves no less to be added to that list.[22]

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[20] In *CIA v. Sims*, 471 U.S. 159, 174 (1985), the Court as in these other cases granted certiorari despite the absence of a circuit conflict where "the harsh realities of the present day" had to be considered as a practical matter.

[21] The latter decision is regarded as the most significant one issued in the more than four decades of the FOIA's existence; it was the subject of an academic conference recently conducted by the Collaboration on Government Secrecy, "Privacy Protection After Twenty Years Under *Reporters Committee*," at which its practical importance was discussed at length. See Program Webcast (Apr. 28, 2009), *available at* http://media.wcl.american. edu/Mediasite/Viewer/?peid=beaabe05-d276-4c16-8dd5-d67b277f4a84.

[22] There also is the practical consideration that at least some information apparently at issue in this case, representative of much information to which Exemption 7(C) in respondent's view should apply, would fall within the "categorical" protection of Exemption 4 under the prevailing rule of *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879-80 (D.C. Cir. 1982) (en banc), *cert. denied*, 507 U.S. 984 (1993). It is entirely unclear on the face of the Court of Appeals' opinion whether Exemption 7(C) was invoked by respondent in lieu of Exemption 4 in this case – and if so, why. *See AT&T Inc. v. FCC*, 582 F.3d at 493 (speaking of respondent's "law enforcement" argument against disclosure only). The basic circumstances of the case certainly lend themselves to Exemption 4 applicability, including, at least in part, "categorical" protection on "voluntariness" grounds. *See* Brief in Opposition [to Certiorari] for Respondent AT&T Inc. at 3 (filed July 13, 2010) (recounting that respondent "voluntarily and confidentially" disclosed certain information to the agency); *see also id.* at 4 (implying but not stating that other information was produced pursuant to agency order). Whatever the explanation for this may be, however, the fact remains that upon ordinary application of *Critical Mass* much of the

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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information that would qualify for "corporate privacy" protection under Exemption 7(C) according to respondent and the Third Circuit would qualify for protection more "categorically" under Exemption 4.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED

NOV 16 2010

OFFICE OF THE CLERK

No. 09-1279

In The
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Petitioners,
v.

AT&T INC. AND COMPTEL,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, law firm and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights, freedoms and structural safe-guards guaranteed by our Constitution.

CAC has filed briefs supporting the protection of individual fundamental rights in this Court, in cases such as *McDonald v. City of Chicago*, *Padilla v. Kentucky*, and *Northwest Austin Municipal Utility District No. 1 v. Holder*. In *Citizens United v. FEC*, CAC filed a brief in this Court noting the different treatment given to individuals and corporations under our Constitution's text and history. Furthermore, CAC has examined the historical treatment of corporations in Court precedent and the development of the idea of "corporate personhood" in American law. Accordingly, CAC has a strong interest in the Court's treatment of the claim of corporate privacy rights in this case.

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

AT&T seeks to shield certain corporate documents from disclosure under Exemption 7(C) of the Freedom of Information Act, which protects documents obtained through law enforcement investigations that could result in an unwarranted invasion of "personal privacy" if disclosed.[2] This exemption has been applied to protect individuals from harassment and embarrassment but never to protect corporate interests. And rightly so—the idea that corporations like AT&T are entitled to the same protection of such fundamental rights as privacy that individual human beings enjoy is seriously out of step with our Nation's history.

From the Founding on, corporations have been regarded as "artificial being[s], invisible, intangible, and existing only in the contemplation of the law." *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819). A corporation is a "creature of the law" that does not possess inalienable human rights, but rather "only those properties which the charter of creation confer on it." *Id.* To be sure, corporate interests and property are protected in certain important ways—under the Constitution's Contract Clause, for example, and the Fourth Amendment's prohibition on unreasonable searches and seizures. Corporations also enjoy the general protection of the laws; for example, in *Citizens United v. FEC*, the Court held that "the First Amendment does not allow political speech restrictions based on a speaker's corporate identity." 558 U.S. 50, 81 (2010). But corporations enjoy First Amendment rights not because they have an inherent dignitary interest in sharing their thoughts and deeply-held convictions, but because the worth of speech under the Constitution "does not depend upon the identity of its source, whether corporation, association, union, or individual." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

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[2] FOIA's Exemption 7(C) exempts from mandatory disclosure records or information compiled for law enforcement purposes when such disclosure could reasonably be expected to constitute an unwarranted invasion of "personal privacy." 5 U.S.C. 552(b)(7)(C).

In contrast to the First Amendment issues in *Citizens United*, a long line of precedent makes clear that corporations and individuals do not stand on equal footing with respect to privacy interests. As the Court has held, "corporations can claim no equality with individuals in the enjoyment of a right to privacy." *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). Congress did not deviate from these first principles in enacting FOIA's "personal privacy" protections.

FOIA's protection of the dignity interests and basic privacy rights of individuals, while establishing separate provisions ensuring that corporations are not subject to commercial harm or property loss as a result of disclosure, is consistent with the historical distinctions between the fundamental rights of individuals as opposed to corporate interests. There is no reason under the text of the statute or existing precedent for the Court to break new ground by extending the concept of "personal privacy" to include the commercial interests of artificial, corporate entities.

ARGUMENT

I. CORPORATIONS HISTORICALLY HAVE BEEN TREATED AS ARTIFICAL ENTITIES CREATED BY THE STATE, NOT AS THE EQUIVALENT OF INDIVIDUAL PERSONS.

From the very beginnings of our Nation and the adoption of its Founding charter, the legal protections afforded to living persons and corporations have been fundamentally different. As its opening words reflect, the Constitution was written for the benefit of "We the People of the United States," U.S. CONST., Preamble, and never specifically mentions corporations. Shortly after ratification, the framers of the Constitution added the Bill of Rights to the original Constitution to protect the fundamental rights of the citizens of the new nation, reflecting the promise of the Declaration of Independence that all Americans "are endowed by their Creator with certain unalienable rights, [and] that among these are life, liberty, and the pursuit of happiness."

Corporations stood on an entirely different footing at the Founding. A corporation, in the words of Chief Justice John Marshall, "is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it."

Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819); *see also Head & Amory v. Providence Ins. Co.*, 6 U.S. (2 Cranch.) 127, 167 (1804) (describing a corporation as a "mere creature of the act to which it owes its existence"). *See generally* JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970, at 15 (1970) ("Knowing their Coke and Blackstone, lawmen in the United States could thus readily accept the established seventeenth-century English doctrine that only the sovereign's act might make a corporation.").

In the 1st Congress, James Madison summed up the Founding-era vision of corporations: "[A] charter of incorporation . . . creates an artificial person not existing in law. It confers important civil rights and attributes, which could not otherwise be claimed." Annals of Congress, 1st Cong., 3rd Sess. 1949 (1791). In short, from the beginning of American history, corporations, unlike the individual citizens that made up the Nation, did not have fundamental and inalienable rights by virtue of their inherent dignity.

Early rulings from the Court provided limited protection for corporations, chiefly in matters relating to property and commerce, while consistently reaffirming a fundamental distinction between corporations and natural persons. This basic understanding of the differences between individual rights and corporate interests held true even in cases in which, for practical reasons, corporations were considered to be "citizens" or persons.

For example, one of the thorniest early questions concerned how to treat corporations for the purposes of federal jurisdiction under Article III. A primary attribute of the corporate form is that it allows the corporation itself to sue and be sued for matters related to corporate rights and duties. But Article III repeatedly refers to "citizens" in defining the types of cases that can be heard by the federal courts, including cases involving "Citizens of different States." U.S. CONST. art. III, § 2. In *Bank of the United States v. Deveaux*, Chief Justice Marshall first addressed this question, holding:

> [t]hat invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and consequently cannot sue or be sued in the courts of the United States, unless the rights of the members in this respect can be exercised in their corporate name. If the corporation be considered as a mere faculty, and not as a company of individuals, who, in transacting their joint concerns, may use a legal name, they must be excluded from the courts of the union.

9 U.S. (5 Cranch) 61, 86-87 (1809).

Chief Justice Marshall concluded that the term "citizen" "ought to be understood as it is used in the constitution, and as it is used in other laws. That is, to describe the real persons who come into court, in this case, under their corporate name." *Id.* at 91. Thus, the Court held that courts had to "look beyond the corporate name, and notice the character of the individual," for purposes of determining whether the parties in a case were in fact "citizens of different states." *Id.* at 90.

Chief Justice Marshall's interpretation of Article III quickly proved unworkable, however, mainly because it allowed corporations to evade federal court jurisdiction whenever it had members that resided in many states. Noting widespread dissatisfaction with *Deveaux*, the Court overruled the decision three decades later in *Louisville, Cincinnati, & Charleston Railroad Co. v. Letson*, holding that "[a] corporation created by a state to perform its functions under the authority of that state . . . seems to us to be a person, though an artificial one, inhabiting and belonging to that state, and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that state." 43 U.S. (2 How.) 497, 555 (1844). Nine years later, in *Marshall v. Baltimore & Ohio Railroad Co.*, the Court emphasized *Letson*'s point that treating a corporations as a "citizen," resident in the state of its incorporation for jurisdictional purposes, was a legal fiction, required mainly to protect citizens wishing to sue out of state corporations in federal court. 57 U.S. (16 How.) 314, 328 (1853).

This treatment of corporations as citizens or persons for practical purposes contrasts with the treatment of corporations in the context of fundamental substantive rights. For example, in *Bank of Augusta v. Earle*, the Court held that even if corporations were to be considered "citizens" in federal court for jurisdictional purposes to ensure that corporations remained accountable in federal court to those they had wronged, corporations were not protected by the substantive guarantees of the Constitution that apply only to "citizens." 38 U.S. (13 Pet.) 519 (1839).

In *Earle*, the Court held that corporations were not entitled to the protection of the Privileges and Immunities Clause of Article IV, which provides that "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV. The Court reasoned that a corporation could not claim both the special privileges that inhere in corporate status and the individual-rights protections the Constitution guarantees to living persons. "If . . . members of a corporation were to be regarded as individuals carrying on business in their corporate name, and therefore entitled to the privileges of citizens . . . they must at the same time take upon themselves the liabilities of citizens, and be bound by their contracts in a like manner." *Id.* at 586. In other words, having accepted special privileges from the state, including limited liability unavailable to citizens, a corporation could not turn around and claim the substantive constitutional protections granted in the Constitution to citizens. *See also Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177

(1869) (noting that while corporations may be considered citizens for the purpose of maintaining federal jurisdiction, "[t]he term citizens [in the Privileges and Immunities Clause] applies only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed").

Even under more expansive historical views of corporate rights that held sway for periods of our Nation's history, corporations never enjoyed the same privacy and liberty interests that individuals were guaranteed.

For example, Justice Field's circuit decision in the *Railroad Tax Cases*—arguably "the most sustained and comprehensive effort to justify reading the Constitution to grant corporations the fundamental constitutional rights possessed by living persons"[3]—conceded that the Due Process Clause's protection of life and liberty does not apply to corporations "because . . . the lives and liberties of the individual corporators are not the life and liberty of the corporation." *Railroad Tax Cases*, 13 F. 722, 747 (C.C.D. Cal. 1882). Likewise, Justice Field agreed that the "privileges and immunities of citizenship" do not "attach to corporations. These bodies have never been considered citizens for any other purpose than the protection of the property rights of the corporators. The status of citizenship . . . does not belong to corporations." *Id.* Thus, while Justice Field's opinion in the *Railroad Taxes* case was revolutionary in suggesting a constitutional mandate to treat corporations the same as individuals with respect to taxation of property, it was nonetheless limited in the range of constitutional rights it protected. *See also Northern Securities Co. v. United States*, 193 U.S. 197, 362 (1904) (Brewer, J., concurring) (observing that corporations are "artificial person[s], created and existing only for the convenient transaction of business," and, as such, "not endowed with the inalienable rights of [] natural person[s]").

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[3] David H. Gans & Douglas T. Kendall, *A Capitalist Joker: The Strange Origins, Disturbing Past and Uncertain Future of Corporate Personhood in American Law* 24 (2010), *available at* http://www.theusconstitution.org/page_module.php?id=11&mid=7.

Accordingly, even in instances where corporations were treated as citizens or persons or otherwise given fundamental constitutional protections, these rights were limited to interests related to a corporation's inherent status as an artificial, state-chartered entity.[4] The idea that corporations should be able to claim protection for privacy rights or other rights that flow from human dignity concerns is unsupported by the historical treatment of corporate rights and "personhood."

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[4] And, of course, the Court has also extended protections that are not specifically tied to personhood, citizenship or individual dignity. For example, the Court has held that the First Amendment applies to corporations, *e.g.*, *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 778, n.14, because the government cannot restrict speech based solely on the identity of the corporate "speaker." *Citizens United v. FEC*, 558 U.S. 50, 81 (2010).

II. THE COURT HAS HELD THAT CORPORATIONS AND INDIVIDUAL PERSONS DO NOT SHARE AN EQUAL RIGHT TO PRIVACY.

While the Court has generally distinguished between the rights and interests of individual persons and those of corporations, it has made this distinction particularly clear in the context of privacy. The Court's contrasting treatment of corporate and individual interests under constitutional protections against unreasonable searches and seizures and self-incrimination are particularly relevant in this case.

In *United States v. White*, for example, the Court reaffirmed that the Fifth Amendment's Self-Incrimination Clause does not protect corporations, observing that the privilege "is essentially a personal one, applying only to natural individuals . . . . The framers . . . who were interested primarily in protecting individual civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such organizations so as to nullify appropriate governmental regulations." 322 U.S. 694, 698, 700 (1944).

While the Court has applied certain Fourth Amendment protections to corporations, specifically those that address the security of certain premises, *e.g.*, *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311 (1978), a corporation's rights against unreasonable searches and seizures are derivative of the individual rights of the people who own and work for the corporation. *See See v. City of Seattle*, 387 U.S. 541, 543 (1967). As the Court explained in *Hale v. Henkel*, 201 U.S. 43 (1906), *overruled in part on other grounds*, *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964):

> A corporation is . . . an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected . . . against unlawful discrimination.

201 U.S. at 76.

Even while extending Fourth Amendment protections to businesses, the Court has been careful to distinguish between individual and corporate rights under the Fourth Amendment. In *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), the Court recognized that the Fourth Amendment rights of corporations are necessarily less extensive than those of living persons. *Morton Salt* rejected a corporation's Fourth Amendment challenge to an administrative order requiring production of documents relevant to an agency investigation of the corporation's trading practices.

The Court unanimously held that:

> corporations can claim no equality with individuals in the enjoyment of a right to privacy. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities . . . Favors from government often carry with them an enhanced measure of regulation . . . . [L]awenforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.

Id. at 368-69 (citations omitted); *see also California Bankers' Ass'n v. Schultz,* 416 U.S. 21, 65-67 (1974) (reaffirming *Morton Salt*). Under *Morton Salt,* corporate records do not receive the same privacy protection as does information pertaining to individuals.

Because corporations are artificial entities with certain special privileges, they are also subject to different measures of regulation than individual human beings are when it comes to privacy. *See Morton Salt,* 338 U.S. 368-69. This differential treatment is reflected in FOIA's disclosure exemptions, discussed below in Section III, which give protection to an individual's "personal privacy" rights under Exemptions 6 and 7(C), while providing protection to a corporation's legitimate business interest in keeping certain sensitive documents confidential under Exemption 4. Because "lawenforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest," *id.* at 369, corporations cannot "plead an unqualified right to conduct their affairs in secret." *See id.* Even with respect to the Fourth Amendment's prohibition against warrantless searches, which the Court has held applies "to shield places of business as well as of residence," *Marshall*, 436 U.S. at 312, "[c]ertain industries have such a history of government oversight that no reasonable expectation of privacy" could exist, *id. See also United States v. Biswell*, 406 U.S. 311 (1972).

The Court's centuries-old distinction between the interests of individuals and corporations under the Fourth and Fifth Amendments remains good law. *See, e.g., Braswell v. United States*, 487 U.S. 99, 100 (1988) (noting that Braswell was not asserting a "self-incrimination claim on behalf of the corporations," as "it is well established that such artificial entities are not protected by the Fifth Amendment"). FOIA's "personal privacy" exemptions, as discussed below, reflect this longstanding recognition of the different privacy interests that individuals and corporations may legitimately claim.

III. FOIA'S PROTECTION OF THE PERSONAL DIGNITY AND PRIVACY RIGHTS OF INDIVIDUALS, WHILE PROVIDING SEPARATE PROTECTION FOR BUSINESS INTERESTS, ACCORDS WITH THE DIFFERENT PROTECTIONS HISTORICALLY AFFORDED TO INDIVIDUALS AND CORPORATIONS.

As demonstrated in Section I, corporations have historically been considered artificial entities distinct from individuals even when corporations, through a legal fiction, are treated as "persons" or citizens. Similarly, while the Administrative Procedure Act (APA), of which FOIA is a part, defines "person" to include corporations, 5 U.S.C. 551(2), the text and legislative history of FOIA's "personal privacy" exemptions show that the legal fiction of corporate "persons" does not extend so far as to give corporations and individuals equal privacy interests. *See* Br. of Pet'r at 17-34 (discussing the text and legislative history of FOIA and its disclosure exemptions).

In addition, as demonstrated in Section II, even as the Court has applied protections against unreasonable searches and seizures to corporations, it has unambiguously held that "corporations can claim no equality with individuals in the enjoyment of a right to privacy." *Morton Salt*, 338 U.S. at 638. FOIA's disclosure exemptions based on "personal privacy," and American law more generally, protect privacy rights to safeguard human dignity and individual autonomy—interests not shared with corporations. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press,* 489 U.S. 749, 763 n.15 (1989) (construing FOIA Exemption 7(C)) and citing Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193, 197-199, 205-207, 213-214 (1890)). Accordingly, FOIA's protection of individual privacy and dignity interests, on the one hand, and corporations' legitimate commercial interests on the other, are consistent with the historical protection of distinct individual and corporate rights.

For example, FOIA exempts from mandatory disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). Exemption 6 establishes "a workable compromise between individual rights and the preservation of public rights to Government information." *Dep't of the Air Force v. Rose,* 425 U.S. 352, 372 (1976) (citation and internal quotation marks omitted). Congress drafted the statutory language of this exemption to strike the "proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information . . . ." *United States Dep't of State v. Washington Post Co.,* 456 U.S. 595, 599 (1982) (quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966)). As the FCC demonstrates, and the lower court assumed, Exemption 6's protection of personal privacy interests affected by the potential disclosure of personnel and medical records applies only to individuals, not corporations. *See* 120 Cong.

Rec. at 17,045 (Sen. Dole) (explaining that "the right of privacy envisioned in [the Exemption] is personal and cannot be claimed by a corporation or association.") (reprinting *Washington Research Project, Inc.* v. *HEW*, 366 F. Supp. 929, 937-938 (D.D.C. 1973), *aff 'd in part on other grounds*, 504 F.2d 238 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1975)). *See generally* Br. of Pet'r at 20-24, 34-41.

Exemption 7(C), at issue in this case, mirrors Exemption 6's use of "personal privacy" with respect to records compiled for law enforcement purposes and suggests that it, too, applies to protect only the privacy of individuals. Indeed, in the debates over Exemption 7(C), Senator Roman Hruska explained that one of "the most important rights" that "an individual may possess, his right to privacy," was at stake. 120 Cong. Rec. at 17,037. *See* Br. of Pet'r at 27-34 (detailing legislative history of Exemption 7(C) and noting the many times concern was expressed regarding protection of an individual's right to privacy). In contrast, there is a well-established principle that a "corporation . . . has no personal right of privacy." Restatement (Second) of Torts § 652I cmt. c (1977). *See also* William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 408- 409 & n.207 (1960) (noting that "the right to privacy is one pertaining only to individuals" and citing cases). "A corporation . . . can have no personal privacy" because the "right of privacy" is "a personal one." William L. Prosser, *Law of Torts* § 97, at 641-642 (2d ed. 1955). *See generally* Br. of Pet'r at 19-20 (distinguishing between privacy rights attributable only to human beings and a corporation's more limited right to protect its name and business reputation).

To be sure, corporations have a legitimate interest in protecting from disclosure certain business information that could subject a company to commercial disadvantage or harm. Congress protected such information in FOIA's Exemption 4, which exempts from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4). Because the APA defines the statutory term "person" to include "an individual, partnership, corporation, association, or public or private organization other than [a federal] agency," 5 U.S.C. 551(2), the exemption specifically protects from disclosure corporations' "trade secrets" and confidential "commercial or financial information." In this way, legitimate corporate interests in confidentiality are protected by Exemption 4, and individual privacy rights are protected by Exemptions 6 and 7(C).

FOIA's different disclosure exemptions for individual privacy and corporate business interests, respectively, are consistent with the way individual and corporate interests in confidentiality and privacy have been treated by the Court. For many reasons, as the Court has explained, "corporations can claim no equality with individuals in the enjoyment of a right to privacy." *Morton Salt Co.*, 338 U.S. at 652. AT&T should not be allowed to claim an unprecedented corporate "personal privacy" interest under FOIA's Exemption 7(C).

CONCLUSION

For the foregoing reasons, the Court should reverse the ruling of the lower court and remand for further proceedings.

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November 2010

AMICUS
CURIAE
BRIEF

Supreme Court, U.
FILED
NOV 16 2010
OFFICE OF THE CLERK

No. 09-1279

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION,
et al.,
Petitioners,
v.

AT&T, INC., et al.,
Respondents.

On a Writ of Certiorari to
The United States Court of Appeals
for the Third Circuit

BRIEF OF *AMICI CURIAE* ELECTRONIC PRIVACY INFORMATION CENTER (EPIC) AND LEGAL SCHOLARS AND TECHNICAL EXPERTS IN SUPPORT OF THE PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The Electronic Privacy Information Center ("EPIC") is a public interest research center in Washington, D.C., which was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other Constitutional values.

EPIC has participated as *amicus curiae* in many cases before this Court and other courts concerning privacy, new technologies, and Constitutional interests. These cases include *Nelson v. Nat'l Aeronautics & Space Admin.*, 530 F.3d 865, 873 (9th Cir. 2008), *cert. granted,* 130 S. Ct. 1755 (U.S. Mar. 8, 2010) (No. 09-530); *City of Ontario v. Quon*, 130 S.Ct. 2619 (2010); *Doe v. Reed,* 130 S. Ct. 2811 (2010); *Flores-Figueroa v. United States,* 129 S. Ct. 1886 (2009); *Herring v. United States,* 129 S. Ct. 695 (2009); *Crawford v. Marion County Election Board,* 128 S. Ct. 1610 (2008); *Hiibel v. Sixth Judicial Circuit of Nevada*, 542 U.S. 177 (2004); *Doe v. Chao,* 540 U.S. 614 (2003); *Smith v. Doe,* 538 U.S. 84 (2003); *Department of Justice v. City of Chicago*, 537

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. *Amici* lodged with the Court Petitioners' and Respondents' letters of consent contemporaneous with the filing of this brief. In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party. EPIC Appellate Advocacy Fellow Conor Kennedy participated in the preparation of this brief.

U.S. 1229 (2003); *Watchtower Bible and Tract Society of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002); *Reno v. Condon*, 528 U.S. 141 (2000); *S.E.C. v. Rajaratnam*, 622 F.3d 159 (2d Cir. 2010); *IMS Health Inc. v. Sorrell*, 631 F. Supp. 2d 434 (D. Vt. 2009), *appeal docketed*, No. 09-1913 (2nd Cir. 2010); *Harris v. Blockbuster Inc.*, 622 F. Supp. 2d 396 (N.D. Tex. 2009), *appeal docketed*, No. 09-10420 (5th Cir. 2009); *National Cable and Telecommunications Association v. Federal Communications Commission*, 555 F.3d 996 (D.C. Cir. 2009); *IMS Health Inc. v. Ayotte*, 550 F.3d 42 (1st Cir. 2008); *Bunnell v. Motion Picture Association of America*, No. 07-56640 (9th Cir. filed Nov. 12, 2007); *Kohler v. Englade*, 470 F.3d 1104 (5th Cir. 2006); *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004), *cert. denied* 544 U.S. 924 (2005); *Ostergren v. Cuccinelli*, 615 F.3d 263 (4th Cir. 2010); *G.D. v. Kenny*, 984 A.2d 921 (N.J. Super. Ct. App. Div. 2009), *cert. granted*, 992 A.2d 793 (2010) (No. 65,366); *Commonwealth v. Connolly*, 913 N.E.2d 356 (2009); and *State v. Raines*, 857 A.2d 19 (Md. 2003).

EPIC has a longstanding interest in personal privacy, government transparency, and the proper application of freedom of information laws. EPIC routinely testifies in Congress on these topics, publishes books on these topics,[2] and maintains several popular web sites devoted to these topics.[3] The EPIC Advisory Board includes distinguished legal scholars and technical experts whose work is focused on these topics.

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[2] LITIGATION UNDER THE OPEN GOVERNMENT LAWS (2010)(Harry A. Hammitt et al eds., 2010); THE PRIVACY LAW SOURCEBOOK: UNITED STATES LAW, INTERNATIONAL LAW, AND RECENT DEVELOPMENTS 2004 (Marc Rotenberg ed., 2004).

The promotion of open government and the protection of personal privacy are both critical to purpose and functioning of the FOIA. EPIC supports the right of individuals to assert personal privacy interests in records held by federal agencies as the statute allows. Consistent with the purposes of the Act, EPIC rejects the interpretation that institutional "persons" – corporations, state governments, foreign sovereigns – have "personal privacy" interests. EPIC therefore opposes the use of FOIA Exemption 7(C)'s "personal privacy" safeguards to prevent the disclosure of agency records concerning corporations that would otherwise be made available to the public. The Third Circuit's determination in the present case contradicts decades of clear consensus among academic and technical experts that "personal privacy" rights apply only to individuals. Moreover, a survey of other privacy statutes makes clear that corporations do not have, and may not assert, "personal privacy" interests.

If upheld, the Third Circuit's interpretation of "personal privacy" would stand as an outlier, untethered to common understanding, legal scholarship, technical methods, or privacy law.

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[3] *E.g.* Privacy.org Homepage, http://www.privacy.org; EPIC Homepage, http://www.epic.org; Privacy Coalition Homepage, http://www.privacycoalition.org.

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SUMMARY OF THE ARGUMENT

The Solicitor General's brief makes clear that the FOIA exemption for "personal privacy" protects the interests of individuals, not corporations. This is evident, as the brief argues, from the text of the Act, the drafting history, the uniform interpretation of the provision, and the fact that the Third Circuit's analyses does not withstand scrutiny and would lead to bizarre results.

Amicus curiae EPIC sets forth the views of legal scholars and technical experts, as well as a survey of related privacy law, in support of Petitioner to underscore that it is also the view of these scholars and experts that the decision below is contrary to widespread understanding, and almost nonsensical.

ARGUMENT

I. According to Legal Scholars, the Phrase "personal privacy" Refers to Individuals, but Not Corporations

The cornerstone of the modern understanding of "privacy" in American law is the 1890 article by Samuel D. Warren and Louis D. Brandeis. The article begins:

> That the *individual* shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. [4] (emphasis added)

And continues:

> Recent inventions and business methods call attention to the next step which must be taken for the *protection of the person*, and for securing to the *individual* what Judge Cooley calls the right "to be let alone."[5] (emphasis added)

Brandeis and Warren explain that their "purpose is to consider whether the existing law affords a principle which can properly be invoked to protect the privacy of the *individual*; and, if it does, what the nature and extent of such protection is."[6]

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[4] Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

[5] *Id.* at 195.

[6] *Id.* at 197.

(emphasis added). The authors note that "[t]he common law secures to each *individual* the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others." (emphasis added). And they find that "[i]n every such case the *individual* is entitled to decide whether that which is his shall be given to the public. No other has the right to publish his productions in any form, without his consent."[7] (emphasis added).

In all, the word "individual" appears 26 times in the article "The Right to Privacy;" the word "corporation" does not appear once.

If it was not obvious that in American law "privacy" would refer to the claims of individuals, in 1928, Justice Brandeis famously described the right of privacy as "the most comprehensive of rights and the right most valued by civilized men," a natural outgrowth of recognizing "the significance of man's spiritual nature, of his feelings and of his intellect."[8] "They knew," Brandeis wrote of the framers who crafted the nation's founding document, "that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations."[9]

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[7] *Id.* at 199.

[8] *Olmstead v. U.S.*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[9] *Id.*

Although AT&T had filed a brief in support of Olmstead in that case,[10] Justice Brandeis did not speak to the corporation's interest; he spoke to the claim of the individual whose personal communications were subject to disclosure without a warrant.

Since *The Right to Privacy* article, and the *Olmstead* dissent, legal scholars have described a modern conception of privacy, a robust, vital right tied to the intricacies of human flourishing and individual autonomy. A rigorous focus on the interest and rights of living, breathing legal subjects spans the spectrum of privacy law commentary, covering financial disclosure,[11] state government databases,[12] national security, and a wide range of other topics.[13] In one of the most influential taxonomies of privacy, Dean Prosser described a "complex of four" privacy torts: intrusion, upon seclusion, public disclosure of private facts, publication of information that places an individual in a false light, and the appropriation of a person's name or likeness.[14] Prosser's articulation was set out in the Restatement of Torts and became the basis for privacy rights in both common law and statute. But no court has ever held that a corporation may sue under the classic privacy torts.[15] As the Restatement

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[10] Brief for American Telephone and Telegraph Company et. al. as Amicus Curiae Supporting Petitioners, *Olmstead*, 277 U.S. 438.

[11] CHRISTOPHER WOLF, PROSKAUER ON PRIVACY: A GUIDE TO PRIVACY AND DATA SECURITY LAW IN THE INFORMATION AGE § 2:1.1 (1st ed. 2007) ("An individual's level of financial information privacy depends on where he or she lives, what rights that person has chosen to exercise, and whether there is a superior need for information asserted by the government.").

[12] Grayson Barber, *Personal Information in Government Records: Protecting the Public Interest in Privacy*, 25 ST. LOUIS U. PUB. L. REV. 63, 73 (2006) ("Confidence in government at all levels is best sustained by access to the information necessary to promote the vigorous public discussion that a well-functioning democracy requires. However, when dealing with information that individuals reasonably expect to remain private and to not be published by the government, there should be a

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presumption that such information will remain confidential unless there is an overriding justification for its disclosure.").

[13] *See e.g.*, David Flaherty, *Privacy Impact Assessments: An Essential Tool for Data Protection*, Presentation to the Annual Meeting of Privacy and Data Protection Officials (Sep. 28, 2000), http://www.rogerclarke.com/DV/PIAsFlaherty.html ("The essential goal is to describe personal data flows as fully as possible so as to understand what impact the innovation or modification may have on the personal privacy of employees or customers and how fair information practices may be complied with.").

[14] William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383-388-89 (1960).

[15] Scott A. Hartman, *Privacy, Personhood, and the Courts: FOIA Exemption 7(c) in Context*, ___ YALE L.J. 379-388 (2010), available at http://ssrn.com?abstract-1684498. *See, e.g., Felsher v. Univ. of Evansville*, 755 N.E.2d 589, 594 (Ind. 2001) (holding that a university, as an artificial entiry, could not assert a privacy claim for appropriations against a former employee who attached its name to his website.)

explains: "A corporation, partnership or unincorporated association has no personal right of privacy."[16]

In 1968 Professor, and later Solicitor General, Charles Fried set out a powerful articulation of this right. He wrote, "privacy is not just one possible means among others to insure some other value, but that it is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship and trust."[17] He concludes:

> The concept of privacy requires, as we have seen, a sense of control and a justified acknowledged power to control aspects of one's environment . . . A legal right to control is control which is the least open to question and argument; it is the kind of control we are most serious about. As we have seen, privacy is not just an absence of information abroad about ourselves; it is a feeling of security in control over that information. By using the public, impersonal and ultimate institution of law to grant persons this control, we at once put the right to control as far beyond question as we can and at the same time show how seriously we take this right.[18]

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[16] RESTATEMENT (SECOND) OF TORTS §652I cmt. c.

[17] Charles Fried, Privacy, 77 YALE L.J. 475-93 (1968), reprinted in
PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 203, 205.
(ed. Ferdinand D. Schoeman 1984).

[18] *Id.* at 219.

More recently, Professor Jerry Kang, a prominent legal scholar, has described the core human interests underlying the right to privacy. First, privacy helps individuals avoid the embarrassment that accompanies the disclosure of certain personal details. Second, privacy helps to preserve human dignity, respect, and autonomy. Finally, privacy helps individuals construct intimacy with others.[19] Prominent privacy scholars have elaborated upon each of these purposes in order to "identify and animate the compelling ways that privacy violations can negatively impact the lives of living, breathing human beings," as Professor Ann Bartow put it:[20]

The embarrassment that results from privacy incursions is uniquely detrimental to humans, with irreparable effects on individuals. As Professor Julie E. Cohen has written:

> The point [of privacy regulation] is not that people will not learn under conditions of no-privacy, but that they will learn differently, and that the experience of being watched will constrain, ex ante, the acceptable spectrum of belief and behavior.[21]

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[19] Jerry Kang, *Info. Privacy in Cyberspace Transactions,* 50 STAN. L. REV. 1193, 1212–16, 1260 (1998).

[20] Ann Bartow, *A Feeling of Unease About Privacy Law,* 155 U. PA. L. REV. PENNUMBRA, 52 (2007).

[21] Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object,* 52 STAN. L. REV. 1373, 1425 (2000).

Professor Cohen cites cognitive psychology research to demonstrate that embarrassment stunts social development and growth, neither of which is fungible or replaceable in human beings.[22] Professor Jeffrey Rosen also observes: "knowledge of private information poses special threats to individuals' ability to structure their lives in unconventional ways."[23] Professor Helen Nissenbaum does as well:

> [I]nsofar as privacy, understood as a constraint on access to people through information, frees us from the stultifying effects of scrutiny and approbation (or disapprobation), it contributes to material conditions for the development and exercise of autonomy and freedom in thought and action.[24]

Privacy expert and attorney Robert Ellis Smith accentuates the connection between this kind of freedom and the productive capacity specific to human beings: "Without privacy, everyone resembles everyone else. A number will do, not a name or personality. Without privacy, individuality perishes."[25]

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[22] *Id.* at 1425, n.195.

[23] Jeffrey Rosen, *The Purposes of Privacy: A Response*, 89 GEO. L.J. 2117, 2121 (2001).

[24] HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE 82 (2010).

[25] ROBERT ELLIS SMITH, OUR VANISHING PRIVACY AND WHAT YOU CAN DO TO PROTECT YOURS 4 (1993).

Professor Anita Allen-Castellitto extends it further, demonstrating that limiting the disclosure of embarrassing personal information strengthens the individual's capacity to experiment and comply with cross-cutting social roles, both in public and behind closed doors:

> Privacy has value as the context in which individuals work to make themselves better equipped for their familial, professional, and political roles. With privacy, I can try to become competent to perform and achieve up to my capacities, as well as to try out new ideas and practice developing skills.[26]

As noted international privacy expert David Falherty has explained:

> The ultimate protection for the individual is the constitutional entrenchment of rights to privacy and data protection. One can make a strong argument, even in the context of primarily seeking to promote data protection, that having an explicit entrenched constitutional right to personal privacy is a desirable goal in any Western society that has a written constitution and a bill of rights. The purpose of creating a constitutional right to privacy is not to leave data protection solely to the court except for the interpretation of the necessary statutes in statutes cases of conflict, but to allow

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[26] Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 739-40 (1999).

> individuals to assert privacy claims that extend beyond the act.[27]

A second set of uniquely human interests underlying the right to privacy are interconnected: dignity, respect, and autonomy. Professor Francesca Bignami urges that "[e]ven in a world in which, thanks to technology, acquiring knowledge about others is virtually effortless, personal autonomy must be respected."[28] Professor Rosen explains how the term applies to privacy law: "autonomy concerns the individuals' ability to maintain a sphere of immunity from social norms and regulations."[29] As Professor Nissenbaum has written:

> [E]ven when we are uncertain whether or not we are being watched, we must act as if we are. When this happens, when we have internalized the gaze of the watchers and see ourselves through their eyes, we are acting according to their principles and not ones that are truly our own.[30]

Professor Gary T. Marx has written:

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[27] David H. Flaherty, PROTECTING PRIVACY IN SURVEILLANCE SOCIETIES 376 (1998).

[28] Francesca Bignami, *The Case for Tolerant Constitutional Patriotism: The Right to Privacy Before the European Courts*, 41 CORNELL INT'L L.J. 211, 223 (2008).

[29] Jeffrey Rosen, *The Purposes of Privacy: A Response*, 89 GEO. L.J. 2117, 2121 (2001).

[30] HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE 82 (2010).

> When the self can be technologically invaded without permission and even often without the knowledge of the person, dignity and liberty are diminished. Respect for the *individual* involves not causing harm, treating persons fairly through the use of universalistically applied valid measures, offering meaningful choices and avoiding manipulation and coercion. These in turn depend on being adequately informed.[31] (emphasis added).

Professor Allen writes that statutory privacy protections are intended to remedy "damage[d] feelings and sensibilities" – a purpose that is inapplicable to corporate entities that are incapable of experiencing hurt feelings.[32]

Former OECD Official and Director of the Harvard Information Infrastructure Project Deborah Hurley adds that:

> Protection of privacy and personal data are important because they go profoundly to our sense of self, individual integrity, and autonomy and to our ability to express ourselves, to communicate with others, and to

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[31] Gary T. Marx, *Murky Conceptual Waters: the Public and the Private* (2001), http://web.mit.edu/gtmarx/www/murkypublicandprivate.html

[32] Anita L. Allen, PRIVACY LAW AND SOCIETY 113 (2007).

participate in the collective, all deep human needs.[33]

Widely renowned privacy advocate Simon Davies has said that the right to privacy is simply:

> . . . the right to protect ourselves against intrusion by the outside world. It is the measure we use to set limits on the demands made by organizations and people. It is the right we invoke to defend our personal freedom, our autonomy and our identity. It is the basis upon which we assess the balance of power between ourselves, and the world around us.[34]

Professor Pamela Samuelson accounts for comparatively stronger privacy protections in Europe with reference to the ultimate loss of dignity, respect, and autonomy: genocide.

> Europeans have more of a civil libertarian perspective on personal data protection in part because of certain historical experiences they have had. One factor that enabled the Nazis to efficiently round up, transport, and seize assets of Jews (and others they viewed as "undesirables") was the extensive repositories of personal data available not only from public sector but also from private sector sources. Europeans may realize more

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[33] Deborah Hurley, *A Whole World in One Glance: Privacy as a Key Enabler of Individual Participation in Democratic Governance,* 1 International Journal of Internet Technology and Secured Transactions 2 (2007).

[34] SIMON DAVIES, BIG BROTHER 23-24 (1996).

> than most Americans the abusive potential for reuses of personal data that may initially have been provided to a particular entity for a specific, limited purpose.[35]

Finally, privacy law scholars highlight human beings' special relationship with the intimate details of their personal lives, which the right to privacy protects. Professor Allen has written that privacy is an essential precursor to "intimate relationships on which workable family and community life depend."[36] Professor Rosen explains:

> If individuals cannot form relationships of trust without fear that their confidences will be betrayed, the uncertainty about whether or not their most intimate moments are being recorded for future exposure will make intimacy impossible; and without intimacy, there will be no opportunity to develop the autonomous, inner-directed self that defies social expectations rather than conforms to them.[37]

Professor Nissenbaum expands this point.

> There are two sides to this coin: our closest relationships of love and friendship are defined by our willingness to share information, yet we signal our trust in and

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[35] Pamela Samuelson, *Privacy As Intellectual Property?*, 52 STAN. L. REV. 1125, 1143-44 (2000).

[36] Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 739 (1999).

[37] *The Purposes of Privacy: A Response*, 89 GEO. L.J. 2117, 2123-24 (2001).

> respect for others by not insisting that they relinquish control over information to us.[38]

Implicit in these accounts of privacy's purposes is a particular understanding of privacy's subject. "While corporations clearly have an interest in maintaining the confidentiality of certain information, *that interest is not a privacy interest*."[39] (emphasis added). The structure of corporate law makes clear that the purposes of privacy could not apply to corporations. This is · not because corporations are not legal subjects, but instead because corporate and securities laws seek to harness scrutiny as a means of ensuring accountability. For corporations, being subject to the gaze of the world is oftentimes the point. Within that structure, the trade secrecy framework operates to protect a more narrowly defined category of secrets in ways that serve the goals of innovation and good stewardship of corporate assets.

Professor Chip Pitts, co-author and editor of the leading legal textbook on corporate social responsibility, thus highlights that far from enshrining corporate privacy rights, the clear trend of the law in the United States and abroad is to require ever greater *transparency* from corporations as a vital means of promoting corporate accountability –

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[38] HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE 84 (2010).

[39] Scott A. Hartman, *Privacy, Personhood, and the Courts: FOIA Exemption 7(c) in Context*, ___ YALE L.J. 379, 384 (2010), available at http://ssrn.com?abstract-1684498.

including for violations of privacy and other human rights held by individuals, not artificial entities.[40]

In sum, scholars in the privacy field are engaged in a rich discussion about the scope of a legal right that concerns the interests of individuals. They explore the various dimensions and settings of privacy claims, the competing claims, the ties to autonomy, personal development, and the political state. On many of these issues, there are differences and disagreements. But as to the central focus of the field – that privacy concerns claims of individuals – there is unanimity.

II. According to Technical Experts, the Phrase "personal privacy" Refers to Individuals, but Not Corporations

Given the specific threats posed to privacy by the emergence of modern computing, it is not surprising that experts in computer security have contributed to the formulation of the modern privacy right.

Willis Ware, a pioneering figure in the computer field whose work contributed directly to the Privacy Act of 1974, wrote "*Privacy* is an issue that concerns the computer community in connection with maintaining personal information on individual citizens in computerized record-keeping systems."[41] (emphasis in the original). Medical privacy expert Latanya Sweeney focuses on the very same interests in her cutting edge research about patient records.

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[40] *See generally* PITTS, CHIP (ed.), KERR, JANDA, & PITTS, CORPORATE SOCIAL RESPONSIBILITY: A LEGAL ANALYSIS. (Butterworths/LexisNexis 2009) (chapter seven, on the legal principle of transparency).

> While law enforcement and counter-terrorism objectives encourage the development of algorithms that learn sensitive information from volumes of disparate data left behind as people conduct their daily affairs, the potential for serious harm to innocent individuals evokes grave privacy concerns.[42]

More recently, experts in the field of cryptography and computer security have stated:

> Privacy is at the very soul of being human. . . . Privacy is the right to autonomy, and it includes the right to be let alone. Privacy encompasses the right to control information about ourselves, including the right to limit access to that information. The right to privacy embraces the right to keep confidence confidential and to share them in private conversation. Most important, the

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[41] R. Turn and W.H. Ware, "Privacy and Security Issues in Information Systems," in D. Johnson and J. Snapper, ETHICAL ISSUES IN THE USE OF COMPUTERS 133 (1976); *see also* U.S. Dep't. of Health, Education, and Welfare, *Secretary's Advisory Committee on Automated Personal Data Systems, Records, Computers, and the Rights of Citizens* (1973).

[42] Latanya Sweeney, *Privacy-Enhanced Linking*, Carnegie Mellon University, School of Computer Science Technical Report CMU-ISRI-05-136 (2005).

> right to privacy means the right to enjoy solitude, intimacy, and anonymity.[43]

As Security Technologist Bruce Schneier has explained, "Privacy is an inherent human right, and a requirement for maintaining the human condition with dignity and respect."[44]

In a seminal article on the future of privacy, computer scientist David Chaum explicitly distinguished the privacy rights of individuals from those asserted by corporations as organizations:

> The choice between keeping information in the hands of individuals or of organizations is being made each time any government or business decides to automate another set of transactions. In one direction lies unprecedented scrutiny and control of people's lives, in the other, secure parity between individuals and organizations. The shape of society in the next century may depend on which approach predominates.[45]

This view of individual technical experts – that privacy protects the interests of individuals – is routinely reflected in the reports of the National

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[43] WHITFIELD DIFFIE & SUSAN LANDAU, PRIVACY ON THE LINE: THE POLITICS OF WIRETAPPING AND ENCRYPTION 126 (1998).

[44] Bruce Schneier, The Eternal Value of Privacy, Wired: Security Matters, http://www.wired.com/politics/security/commentary/securitymatters/2006/05/70886/ (May 18, 2005).

[45] David Chaum, *Achieving Electronic* Privacy, SCI. AM., Aug. 1992, at 96.

Academies of Science concerning privacy. As one recent report states:

> Privacy is a growing concern in the United States and around the world. The spread of the Internet and the seemingly boundaryless options for collecting, saving, sharing, and comparing information trigger consumer worries. Online practices of business and government agencies may present new ways to compromise privacy, and e-commerce and technologies that make a wide range of personal information available to anyone with a Web browser only begin to hint at the possibilities for inappropriate or unwarranted intrusion into our personal lives.[46]

There are many fields in computer science that concern a broader range of interests, including those of corporations. But when technical experts speak of "personal privacy," they are referring to individuals, but not corporations.

III. A Survey of Privacy Laws Makes Clear that the Phrase "personal privacy" Refers to Individuals, but Not Corporations

It is not unreasonable to begin an examination of the meaning of key terms in law by beginning with the primary source on which many lawyers and court's rely. Black's Law Dictionary uses the term "privacy" only for individuals, not for corporations:

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[46] THE NATIONAL ACADEMIES, ENGAGING PRIVACY AND INFORMATION TECHNOLOGY IN A DIGITAL AGE (2007).

> **Privacy law (1936).** 1. A federal or state statute that protects a person's right to be left alone or that restricts public access to personal information such as tax returns and medical records. 2. The area of legal studies dealing with a person's right to be left alone and with restricting access to personal information such as tax returns and medical records.
>
> **personal, adj (14c).** 1. Of or affecting a person.[47]

In fact, in more than a dozen examples, Black's sets out definitions that focus on the claims of individuals and not corporations.[48]

Privacy statutes mirror Black's definition, consistently protecting individual rights, but not rights of corporations.

A. Privacy Statutes Consistently Protect Individual Rights, but Not Rights of Corporations

The Freedom of Information Act is part of a broad framework of privacy legislation built around the protection of individuals. Throughout the history of the United States, Congress has passed privacy laws that have been aimed at creating and developing an individual right of privacy, not a right for corporations or other non-natural persons.[49]

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[47] BLACK'S LAW DICTIONARY, 9th Ed., for the iPhone/iPad/iPod Touch. Version 2.0.0.

[48] *Id. See, e.g,* "privacy act," "zone of privacy," "autonomy privacy," "right of privacy," "right to privacy," "privacy privilege," "Privacy Act of 1974," "invasion of privacy," "informational privacy," "marital-privacy doctrine," "Video Privacy Protection Act," "invasion of privacy by intrusion," "invasion of privacy by false light," "invasion of privacy by appropriation," "invasion of privacy by public disclosure."

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[49] Privacy Act of 1974, 5 U.S.C. § 552a (2010); Federal Education Rights and Privacy Act, 20 U.S.C. § 1232g (2010); Cable Communications Policy Act of 1984, 47 U.S.C. § 551 (2010); Video Privacy Protection Act of 1988, 18 U.S.C. § 2710 (2010); Employee Polygraph Protection Act 29 U.S.C. §§ 2001 – 2009 (2010); Right to Financial Privacy Act, 12 U.S.C. §§ 3401 – 3422 (2010); Privacy Protection Act, 42 U.S.C. § 2000aa (2010); Telephone Consumer Protection Act, 47 U.S.C. § 227 (2010); Driver's Privacy Protection Act, 18 U.S.C. §§ 2721 – 2725 (2010); No Child Left Behind Act, 20 U.S.C. § 1232h (2010); Telecommunications Act of 1996, 47 U.S.C § 222 (2010); Video Voyeurism Prevention Act, 18 U.S.C. § 1801 (2010); Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191 §§ 262, 264; 45 C.F.R. §§160-164; E-Government Act of 2002, 44 U.S.C. § 101 (2010); Homeland Security Act of 2002, 6 U.S.C. § 460 (2010); Genetic Information Nondiscrimination Act, Pub. L. 110-233 (2008); Financial Services Modernization Act, Pub. L. No. 106-102 (1999), codified at 15 U.S.C. §§ 6801-6809 (2010); Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501 – 6506 (2010); Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681y (2010). *But c.f.* Stored Communications Act, 18 U.S.C. §§ 2701 – 12 (2010). *See generally,* THE PRIVACY LAW SOURCEBOOK: UNITED STATES LAW, INTERNATIONAL LAW, AND RECENT DEVELOPMENTS 2004 (Marc Rotenberg ed., 2004).

The primary source of privacy legislation in the United States is the Privacy Act of 1974.[50] With the Privacy Act, Congress recognized that "in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies."[51] The Act, among other things, prevents an administrative agency from disclosing "any record . . . except pursuant to a written request by, or with the prior written consent of, the *individual* to whom the record pertains."[52] (emphasis added). The Act also allows an individual to "gain access to his record or to any information pertaining to him," and requires agencies to retain only "such information about an *individual* as is relevant and necessary." (emphasis added). The statute does not once mention a "corporation" or an "organization."

Agencies were further restricted in their use of personal information in the E-Government Act of 2002, which requires an agency to create Privacy Impact Assessments whenever it is "developing or procuring information technology that collects, maintains, or disseminates information that is in an identifiable form; or initiating a new collection of information that . . . includes any information in an identifiable form permitting the physical or online contacting of a specific individual."[53] Also passed in

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[50] 5 U.S.C. § 552a (2010).

[51] Pub. L. No. 93-579 § 2 (1974).

[52] 5 U.S.C. § 552a(b).

[53] 5 U.S.C. §552b (2010).

2002 was the U.S. Homeland Security Act, which, among other things, prohibited agencies from implementing the Terrorism Information and Prevention System ("TIPS")[54] and explicitly denied authorization of any "national identification system or card."[55] TIPS was supposed to be a "nationwide program giving millions of American truckers, letter carriers, train conductors, ship captains, utility employees, and others a formal way to report suspicious terrorist activity."[56]

Passed in the same year as the Privacy Act is the Family Educational Rights and Privacy Act ("FERPA").[57] FERPA serves to protect the privacy interests of specific individuals, students in this case, by preventing any "educational agency or institution" that receives public funding from "releasing, or providing access to, any personally identifiable information in education records other than directory information."[58]

In 2001, Congress expanded individual student privacy in the No Child Left Behind Act, prohibiting any requirement for a student to "submit to a survey, analysis, or evaluation that reveals information concerning (1) political affiliations or beliefs of the student or the student's parents, (2) mental or psychological problems of the student or the student's family, (3) sex behavior or attitudes, (4) illegal, anti-social, self-incriminating, or demeaning behavior, (5) critical appraisals of other individuals with whom respondents have close family relationships, (6) legally recognized privileged or analogous relationships . . . , (7) religious practices, affiliations, or beliefs of the student or the student's parent, or (8) income, without the prior consent of the student."[59]

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[54] 6 U.S.C. § 460 (2010).

[55] 6 U.S.C. § 554 (2010).

[56] American Library Association: Terrorism Information and Prevention System, http://www.ala.org/ala/aboutala/offices/oif/ifissues/terrorisminformationprevention.cfm (last visited Nov. 11, 2010).

[57] 20 U.S.C. § 1232g (2010).

[58] 20 U.S.C. § 1232g(b)(2).

Many other statutes reflect purposes similar to the Privacy Act, namely to assign a range of responsibilities associated with the collection and use of personally identifiable information so as to protect the interests of the individual. The Cable Communications Policy Act of 1984 prevents cable operators from collecting "personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned."[60] In the Video Privacy Protection Act, Congress created liability against "a video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider."[61] Congress passed the Employee Polygraph Protection Act in 1988, generally prohibiting employers from (1) requiring or suggesting that an employee or prospective employee "submit to any lie detector test," (2) using "the results of any lie detector test," or

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[59] 20 U.S.C. § 1232h(b).

[60] 47 U.S.C. § 551(b)(1) (2010).

[61] 18 U.S.C. § 2710(b)(1) (1988).

(3) taking employment action, including to "discharge, discipline, discriminate against in any manner, or deny employment or promotion to," any employee who refuses to take a lie detector test or institutes or testifies in a proceeding under or related to this Act.[62]

Congress expanded the statutory privacy rights of individuals in 1978 to include a prohibition on the Government's authority to obtain copies of, access to, or information contained in the financial records of a customer from a financial institution without following certain notice and challenge procedures.[63] Though it must have been clear that public corporations and organizations with bank accounts would have an interest in keeping these records confidential, Congress unambiguously chose to protect only the privacy of records for "individuals" or small partnerships with "five or fewer individuals."[64] The Financial Services Modernization Act, also known as the Gramm-Leach Bliley Act ("GLBA"), was passed in 1999.[65] GLBA consolidates financial institutes and allows these institutions to share consumer information with their affiliates for sales and promotional purposes.[66] In order to protect consumer privacy, the GLBA requires financial institutions to "protect the security and confidentiality of . . . customers' nonpublic personal information" by giving customers the right to opt-out of having their personal information sold to third parties.[67] Institutions also must prevent fraudulent access to personal customer information and provide privacy policy notices.[68] These protections are designed to protect the privacy of data that a customer provides to his or her financial institution, not the institution itself.

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[62] 29 U.S.C. § 2002(1)-(4) (1988).

[63] Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422 (2010).

[64] 12 U.S.C. § 3401(4) (2010).

[65] Pub. L. No. 106-102 (1999), codified at 15 U.S.C. §§ 6801-6809 (2010).

[66] *Id.*

In 1980, Congress passed the Privacy Protection Act, which rendered it unlawful for "a government officer or employee . . . to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication . . . ."[69] Again, Congress unambiguously placed the privacy interest with the individual who created the work product, and not with an employer broadcast or communication corporation.[70] Similar prohibitions on the government come from the 1994 Driver's Privacy Protection Act.[71] This Act prevents the government from disclosing any "personal information . . . about any *individual* obtained by the department in connection with a motor vehicle record" or "highly restricted personal information . . . about any individual obtained by the department in connection with a motor vehicle record."[72] (emphasis added).

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[67] 15 U.S.C. § 6801(a).

[68] 15 U.S.C. § 6802(a).

[69] 42 U.S.C. § 2000aa(a) (2010).

[70] *See id.*

[71] 18 U.S.C. §§ 2721-2725 (2010).

The Health Insurance Portability and Accountability Act ("HIPAA"), enacted in 1996, was adopted to ensure health care providers protect the privacy of individuals' health records and data.[73] HIPAA includes privacy protections for "individually identifiable health information."[74] That term is defined in the Act as "any information, including demographic information collected from an individual, that . . . relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual, and identifies the individual; or with respect to which there is a reasonable basis to believe that the information can be used to identify the individual."[75] The Genetic Information Nondiscrimination Act ("GINA") of 2008[76] further protected health information of individuals. GINA provides that "a group health plan . . . shall not request or require an *individual* or a family member . . . to undergo a genetic test."[77] (emphasis added). In addition, health insurers also may not "request, require or purchase genetic information for underwriting purposes."[78] Since corporations and organizations cannot possess genetic information, the privacy interests protected by this statute, again, are exclusive to individuals.

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[72] 18 U.S.C. § 2721(a)(1)-(2) (1994).

[73] Pub. L. No. 104-191 §§ 262, 264; 45 C.F.R. §§160-164.

[74] 42 U.S.C. § 1320d (2010).

[75] 42 U.S.C. § 1320d(6).

[76] Pub. L. 110-233 (2008).

[77] Pub. L. 110-233 § 110(c)(1).

The Telephone Consumer Protection Act was passed in 1991 to protect privacy rights in telephone solicitations. The Act created a private right of action against anyone who would "initiate any telephone call to any residential telephone line using an artificial or prerecorded voice . . . without the prior express consent of the called party."[79] In passing the statute, Congress emphasized the intrusive nature of such automated phone calls into the home.[80] In the statute, Congress strictly limited the prohibition to residential calls and calls to emergency telephone lines that may pose a "risk to public safety."[81]

The Video Voyeurism Protection Act was passed more than a decade later, in 2004, in response to a new threat to safety and security. The Act creates recourse against one who, on federal lands, "has the intent to capture an image of a private area of an *individual* without their consent, and knowingly does so under circumstances in which the *individual* has a reasonable expectation of privacy."[82] (emphases added). The references to an individual in this act are bolstered by the impossibility of a non-natural person possessing a violable privacy interest in this case.

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[78] Pub. L. 110-233 § 110(d)(1).

[79] 47 U.S.C. § 227(b)(1)(B) (2010).

[80] Pub. L. 102-243 § 2 (1991).

[81] 47 U.S.C. § 227(b)(1); Pub. L. 102-243 § 2.

[82] 18 U.S.C. § 1801(a) (2010).

In contrast, when dealing with a corporation or organization's proprietary information, statutes typically use the term "confidentiality," as opposed to "privacy." For example, the Telecommunications Act of 1996 addresses concerns with Consumer Proprietary Network Information ("CPNI"), including calling patterns, billing records, and unlisted telephone numbers of service subscribers.[83] The Act provides that "every telecommunication carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers."[84] Compare this language to the Act's provision under the heading "privacy requirements for telecommunications carriers," which addresses the customer's interest in their own data, preventing telecommunications carriers from using that information outside the "provision of . . . the telecommunications service from which such information is derived, or . . . services necessary to, or used in, the provision of such telecommunications service."[85]

B. Even When a Privacy Statute Defines "Person" to Include Corporations, "Personal" Still Refers Only to Individuals

Congress often defines the term "person" within statutes in order to encompass "natural persons," "corporations," "organizations," and other entities.

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[83] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996); 47 U.S.C. § 222(h)(1).

[84] 47 U.S.C. § 222(a) (2010).

[85] 47 U.S.C. § 222(c)(1).

However, even in these statutes, the term "personal," when grouped with a noun, such as "personal privacy," is still used to refer to the rights of an individual.

In 1970, Congress passed the Fair Credit Reporting Act ("FCRA").[86] The Act protects individuals from misuse of personal information by Credit Reporting Agencies by only allowing disclosure of personal information to persons whom they have reason to believe intend to use the information to evaluate an application for credit, employment, insurance, license, or governmental benefit.[87] For purposes of the FCRA, Congress defined "person" to include "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity."[88] This is a very broad definition, and mandates that every use of the word "person" is to be inclusive of each entity described, such as "communication of that information among persons related by common ownership or affiliated by corporate counsel," and "the person who makes the communication."[89] This is compared with the statute's use of the term "individual," such as in the definition of "medical information," to include "the past, present, or future physical, mental, or behavioral health or condition of an individual."[90]

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[86] 15 U.S.C. §§ 1681-1681y (2010).

[87] 15 U.S.C. § 1681b.

[88] 15 U.S.C. § 1681a(b).

[89] 15 U.S.C. § 1681a(d)(2)(A)(iii); 15 U.S.C. § 1681a(o)(5)(C).

The treatment of language in regard to these terms is identical to that used in the Freedom of Information Act. The FCRA then goes on use the term "personal characteristics" twice: in the definition of "consumer report," within a list of information that could bear "on a consumer's credit worthiness,"[91] and again in the definition of "investigative consumer report," within a list of "information on a consumer's character."[92] In this case it is obvious that even though "person" can include a range of entities, "personal," obviously can only logically refer to an individual and not a "person" as defined by the statute.

As previously mentioned, the Driver's Privacy Protection Act ("DPPA") prevents the government from disclosing any "personal information . . . about any *individual* obtained by the department in connection with a motor vehicle record" or "highly restricted personal information . . . about any individual obtained by the department in connection with a motor vehicle record."[93] (emphasis added). The DPPA defines "person" to encompass "an individual, organization, or entity, but . . . not include[ing] a

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[90] 15 U.S.C. § 1681a(i)(1)(A).

[91] 15 U.S.C. § 1681a(d)(1). The term "consumer" is explicitly defined to mean an individual. 18 U.S.C. § 1681a(c).

[92] 15 U.S.C. § 1681a.

[93] 18 U.S.C. § 2721(a)(1)-(2) (1994).

State or agency thereof."[94] However, "personal information" is defined without regard for the more expansive definition of "person," and only includes "information that identifies an individual."[95]

The Children's Online Privacy Protection Act ("COPPA") states that it is "unlawful for an operator of a website or online service directed to children...to collect personal information from a child."[96] Personal Information is defined to include "individually identifiable information about an *individual* collected online, including (A) a first and last name, (B) a home or other physical address including a street name and name of a city or town, (C) an e-mail address, (D) a telephone number, (E) a Social Security number, (F) any other identifier that the Commission determines permits the physical or online contacting of a specific individual, or (G) information concerning the child or the parents of the child that he website collects online from the child and combines with an [other] identifier."[97] (emphasis added). As used in this definition, it is clearly and unambiguous that "personal information" refers to information solely about an individual. However, COPPA goes on to define "person" to include "any individual, partnership, corporation, trust, estate, cooperative, association, or other entity."[98] This separation of meaning demonstrates the difference in Congress' treatment of the two terms.

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[94] 18 U.S.C. § 2725(2).

[95] 18 U.S.C. § 2725(3)-(4).

[96] Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501 – 6506, 6502(a)(1) (2010).

[97] 15 U.S.C. § 6501(8).

[98] 15 U.S.C. § 6501(11).

Recently, in 2002, Congress passed the Federal Hazardous Substances Act to address and prohibit, among other things, "the introduction or delivery for introduction into interstate commerce of any misbranded hazardous substance or banned hazardous substance."[99] The statute uses the relevant terms in an area outside of the privacy realm, though Congress uses the same treatment in distinguishing the meaning of the terms "person" and "personal."[100] The Act provides an expansive definition of "person," for it to reference "an individual, partnership, corporation, and association."[101] However, the statute later defines "hazardous substance" to include, in part, "any substance or mixture which . . . generates pressure through decomposition, heat, or other means, if such substances or mixture of substances may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use, including reasonably foreseeable ingestion by children."[102]

In this definition, as in other privacy laws, the word "personal" can only be logically understood to reference the injury to an individual: a non-natural person simply cannot experience the types of injuries the statute categorizes as "personal."

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[99] Federal Hazardous Substances Act, 15 U.S.C. §§ 1261 – 1278a, 1263(a) (2010).

[100] *See* 15 U.S.C. § 1261.

[101] 15 U.S.C. § 1261(e).

[102] 15 U.S.C. § 1261(f)(1)(A)(vi).

CONCLUSION

If upheld, the Third Circuit's interpretation of "personal privacy" would stand as an outlier, untethered to common understanding, legal scholarship, technical methods, or privacy law.

Amici respectfully request this Court to grant Petitioners' motion to reverse the decision of the lower court.

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November 16, 2010

AMICUS
CURIAE
BRIEF

Supreme Court, U.S.
FILED

NOV 16 2010

OFFICE OF THE CLERK

No. 09-1279

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Petitioners,

v.

AT&T, INC. and COMPTEL,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF FREE PRESS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Free Press is a national, nonprofit, nonpartisan organization dedicated to reforming the media. Founded in 2002, the organization has approximately 500,000 members and supporters across the country. Through education, organizing, and advocacy, Free Press seeks to promote universal access to communications technologies and infrastructure; preservation of the Internet as a vibrant platform for commerce, speech, and culture; diverse and independent media ownership; strong public media; and quality journalism. Free Press's work is grounded in the idea that structural reform of the media is one key to developing a more representative democracy — its mission is animated by the belief that citizens can only make informed decisions if they have access varied and diverse sources of news and analysis.

As a part of Free Press's advocacy work, it participates extensively in proceedings before the Federal Communications Commission. In 2010 alone, Free Press has filed substantive comments in over two dozen open Commission proceedings. Free Press's submissions are among the most extensive and thorough filings offered by public interest advocates in Commission proceedings. Free Press's policy staff frequently testify before the Commission and Congress, addressing media and telecommunications policy issues.[2]

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* certify that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk of the Court pursuant to Rule 37.3.

Advocating for greater transparency at the FCC has been a key component of Free Press's telecommunications and media policy agenda. For example, Free Press recently filed comments encouraging the Commission to reform its *ex parte* notice process such that the filing of letters memorializing *ex parte* meetings with Commission staff provides more meaningful disclosure regarding the interests of the participants, as well as the nature of such discussions and their impact on the policymaking process. *Reply Comments of Free Press, Amendment of the Commission's Ex Parte Rules and Other Procedural Rules*, GC Docket No. 10-43 (June 8, 2010).

Further, organizations such as Free Press rely on requests made pursuant to the Freedom of Information Act (FOIA) to better understand how media and telecommunications policy gets made, as well as whether and how the FCC enforces its rules. Information gathered as a result of FOIA requests — whether made by Free Press or other organizations — also helps Free Press develop and calibrate its own policy positions and goals, as well as enables it to hold the Commission accountable for agency overreach, inaction, and misconduct.

SUMMARY OF ARGUMENT

Free Press agrees with Petitioners: the FOIA exemption that allows withholding of law enforcement records if disclosure could reasonably be expected to constitute an unwarranted invasion of "personal privacy" does not apply to corporate entities. See, e.g., Pet. Br. at 13 (explaining that the text and drafting history of Exemption 7(C), as well as FOIA's broader structure, does not support the Third Circuit's creation of a "personal privacy" right for corporation under FOIA).

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[2] For a sampling of Free Press's research, filings, and written testimony, see www.freepress.net/resources/library.

Free Press submits this brief to emphasize two points: First, acknowledging a corporate right to privacy in this case would contravene this Court's jurisprudence interpreting both FOIA and the Constitution, which consistently rejected the notion that corporations as entities possess purely dignitary interests like a right to "personal privacy." Second, such a result would significantly undermine the core purpose of FOIA *and* would hamper the ability of individuals and interested organizations to advocate for policies that promote the public interest before the FCC.

1. The Third Circuit's novel creation of a right to corporate privacy in the context of FOIA litigation misinterprets this Court's privacy jurisprudence. The Court's cases interpreting both FOIA and the Constitution recognize that the right to privacy is grounded in our notions of individual dignity and autonomy. See, e.g., *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977); *Winston v. Lee*, 470 U.S. 753, 758-59 (1985) (characterizing the privacy right protected by the Fourth Amendment as the "right to be let alone") (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). Thus, to the extent that the Court has recognized a privacy right for corporations in other contexts, it has done so to protect the privacy interests of individuals who happen to be affiliated with the corporation. The corporation's right is fundamentally derivative of various individuals' right to privacy; it is not a right enjoyed by the corporation in the abstract. See, e.g., *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978). In the instant case, there is no dispute that individuals affiliated with respondent AT&T enjoy the privacy protections of Exemption 7(C). See *SBC Commc'ns, Inc.*, 23 F.C.C.R. 13,704, 13,705 (2008). By extending the privacy protections contained in Exemption 7(C) to guard against reputational harms or harassment suffered by corporations *as* corporations, the Third Circuit exceeded the boundaries of this Court's privacy cases.

2. The Third Circuit's decision also undermines FOIA's core purpose — the right of citizens to "know what their government is up to." *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772-73 (1989) ("*Reporters Committee*") (internal quotation marks, citations, and emphasis omitted). In general, FOIA seeks to "open agency action to the light of public scrutiny," see *United States Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 498 (1994) (internal quotation marks and citation, omitted). In the case of the FCC, a critical agency function is to adopt and enforce rules that apply to regulated entities like AT&T, the respondent seeking to assert a privacy interest. See, e.g., 47 U.S.C. § 154(*i*) (establishing the Commission's rulemaking authority); 47 U.S.C. § 208 (establishing procedures for bringing complaints against common carriers). By creating a right to corporate privacy, the Third Circuit's decision undermines the public's ability to obtain information about the FCC's fulfillment of its operative mandate — the enforcement of the laws and regulations under its jurisdiction. See 47 U.S.C. § 151 (creating the Commission to "enforce the provisions" of the Communications Act). But the harm done by the Third Circuit's opinion does not end there. The purpose of FOIA is disclosure; however, disclosure is merely a tool used by an informed citizenry to participate more effectively in the political and regulatory processes. The Third Circuit's decision undermining disclosure will further limit the ability of citizens to participate meaningfully in FCC proceedings and advocate for the formation of media and technology policies that serve the public interest.

This Court should reject the Third Circuit's unwarranted and unsound departure from precedent. The judgment of the Court of Appeals must be reversed.

ARGUMENT

I. THE THIRD CIRCUIT'S INTERPRETATION OF FOIA EXEMPTION 7(C) DEPARTS FROM THIS COURT'S PRECEDENTS ADDRESSING BOTH FOIA AND CORPORATE PRIVILEGES.

Congress enacted FOIA to "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (internal quotation marks and citation omitted). "[T]he Act is broadly conceived," and "disclosure, not secrecy, is the dominant objective of the Act." *Id.* Disclosure of agency records is mandatory under FOIA, 5 U.S.C. § 552(a), and the statute's exemptions are to be narrowly construed. See *Rose,* 425 U.S. at 361.

As relevant here, FOIA's Exemption 7(C) permits agencies to withhold records or information if such records are "compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). When the Third Circuit construed FOIA's Exemption 7(C) to recognize a corporation's interest in "personal privacy" distinct from the privacy of individuals who may be affiliated with the corporation, not only did it depart from the language of the statute itself as Petitioners have argued, Pet. Br. at 17-20, but it also it departed from both the principle of favoring disclosure and from this Court's settled precedent in interpreting both FOIA and corporate rights.

A. This Court's FOIA Decisions Characterize The Statute's Personal Privacy Exemptions As Protecting The Interests Of Natural Persons, Not Corporations.

This Court's characterizations of the privacy interests protected by FOIA make clear that corporations do not have "personal privacy" interests under the Act. In *Reporters Committee*, this Court described the privacy interest protected by FOIA as "the *individual* interest in avoiding disclosure of personal matters." 489 U.S. at 762 (citing *Whalen*, 429 U.S. at 598-600 (emphasis added)). Other discussions of the values protected by the exemption make clear that the Court sought to safeguard the interests of individual dignity which do not extend to corporations.

First, in *Reporters Committee*, the Court observed that historically, "[t]he common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others." *Id.* at 763 n.15 (quoting Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 198 (1890)). Such a characterization plainly does not support extending the personal privacy exemptions under FOIA to corporations. Corporations cannot be said to have "thoughts, sentiments, [or] emotions," which are the kinds of private musings and innermost feelings that this Court ascribed as unique to the individual.

To the extent that written documents of a corporation could be construed to be reflective of something analogous to "thoughts" or "sentiments," such records once submitted to the FCC are not protected by any "personal privacy" interests. Under FOIA, the potential harm from disclosure of such documents is limited to competitive harm, and is fully contemplated under, and addressed by, FOIA Exemption 4. See Pet. Br. at 24-27. Furthermore, under the Communications Act, the Commission has broad authority to inspect such books and records. For example, with respect to common carriers, the Communications Act mandates that "[t]he Commission shall at all times have access to and the right of inspection and examination of all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept by such carriers." 47 U.S.C. § 220(c). The Commission enjoys not only the right to inspect such records at will, but also the right to "prescribe the form" of such records. *Id.* § 220(a). FCC access to, and partial control over, any and all such documents belies any claims of "personal privacy" in their contents; thus, no personal privacy interest that may be attributed to a corporation itself inheres to corporate documents in the possession of the FCC.

Second, the Court has discussed the right of privacy protected by FOIA as "the right to control the flow of information concerning the details of one's individuality." *Reporters Committee,* 489 U.S. at 764 n.16 (quoting *Project, Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971, 1225 (1975)). Here, again, AT&T can make no claim to "individuality." By its very nature, it is not an individual — rather, it is an artificial entity made possible by the laws of the state and the *collective* accumulation of capital by many individuals. Cf. *United States v. Morton Salt Co.*, 338 U.S. 632, 652

(1950). Moreover, it seems strange indeed to refer to AT&T as the kind of organization that has the "right to control the flow of information" about itself. The corporation is a highly regulated entity subject to numerous disclosure requirements both before the FCC and other federal agencies.[3]

Third, in *National Archives and Records Administration v. Favish*, 541 U.S. 157, 167 (2004), the Court characterized the privacy interest contemplated by FOIA as the "privacy rights against public intrusions long deemed impermissible under the common law and in our cultural traditions." In so doing, the Court cited the deeply personal example of autonomy in the conduct of burial rites. *Id.* at 167-69. Corporations have never enjoyed these kinds of rights; indeed, many cases in our common law have emphasized that (1) corporations are artificial entities and (2) because corporations are creatures of the state, the state continues to have visitorial powers to inquire into the affairs of a corporation. See, e.g., *Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819); *Hale v. Henkel*, 201 U.S. 43, 74 (1906); *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 204 (1946) ("Historically private corporations have been subject to broad visitorial power . . . of the incorporating state, when their activities take place within or affect interstate commerce.").[4] Because the FOIA privacy rights are grounded in the historical dignitary liberties we have accorded to individuals, not corporations, the Third Circuit erred in creating a "corporate personal privacy interest" cognizable under FOIA.

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[3] For example, as a broadband service provider, AT&T provides semiannual reports to the FCC regarding the nature and extent of its broadband service offerings and subscribers. See, e.g., *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership*, WC Docket No. 07-38, Report and Order and Further Notice of Proposed Rulemaking, 23 F.C.C.R. 9,691 (2008); Order on Reconsideration, 23 F.C.C.R. 9,800 (2008) (modifying requirements for submitting these data). As a publicly traded company, AT&T also submits detailed filings to the Securities Exchange Commission. See AT&T Online SEC Filings, http://phx.corporate-ir.net/phoenix.zhtml?c=113088&p=irolsec&control_selectgroup=Show%20All (last visited Nov. 15, 2010) (providing online versions of recent SEC filings).

Finally, in discussing the redactions permitted under FOIA, Congress has explained that allowing those redactions "balance[s] the public's right to know with the private citizen's right to be secure in his personal affairs which have no bearing or effect on the general public." *Reporters Committee*, 489 U.S. at 766 n.18 (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 7 (1965)). In the instant matter, no one could reasonably contend that AT&T's actions in complying with a government investigation into potential misuse of E-Rate Universal funds "have no bearing or effect on the general public."[5] Indeed, the

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[4] It is true that this Court has extended rights to corporations in various contexts, including in the context of unreasonable searches and seizures, but these cases amply demonstrate that releasing corporate documents is not the kind of "public intrusions long deemed impermissible under the common law and in our cultural traditions." *Favish*, 541 U.S. at 167.

[5] E-Rate is a program administered by the FCC with the goal of improving the access of education institutions, such as schools and libraries, to advanced telecommunications technologies. The fund distributes in excess of $2 billion each

Court has recognized that, unlike private citizens, corporations are "endowed with public attributes" and "have a collective impact upon society, from which they derive the privilege of acting as artificial entities." *Morton Salt*, 338 U.S. at 652. Thus, the legislative history of FOIA, coupled with this Court's precedent, further confirm that it makes little sense to extend the personal privacy protections of Exemption 7(C) to corporations whose very existence springs from the public concern.

Taken together, these cases stand for the proposition that the personal privacy interests protected by Exemption 7(C) are grounded in notions of personal dignity and autonomy, including the right to be let alone, the right to withhold one's thoughts from public consumption, and the right to make life and death decisions or follow traditions and customs without interference from the state. While our common law and traditions accord corporations certain kinds of privileges, such as the ability to enjoy government subsidies, see 47 U.S.C. § 254, or the ability to take advantage of particular tax structures, and certain kinds of rights, such the right to just compensation for the taking of property, *Brooks-Scanlon Corp. v. United States*, 265 U.S. 106 (1924), it has never accorded corporations purely dignitary interests. See, e.g., *United States v. White*, 322 U.S. 694, 698-700 (1944). Instead, this Court

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year, 47 C.F.R. §54.507(a), and has been the frequent subject of controversy, including findings of waste, fraud, and abuse. See, e.g., FCC Office of Inspector General Semiannual Report to Congress, October 1, 2009 through March 31, 2010 at 23, available at http://www.fcc.gov/oig/SAR_March_2010_050710.pdf (last visited Nov. 12, 2010).

traditionally treated corporations as "artificial being[s], invisible, intangible, and existing only in contemplation of law." See *Dartmouth Coll.*, 17 U.S. at 636. Creating cognizable privacy interests for corporations under FOIA would mark a dramatic departure from these cases and the cultural traditions of our society.

B. This Court's Cases Interpreting The Fourth Amendment, Self-Incrimination, And Substantive Due Process Cases Also Demonstrate that Corporations Do Not Have The Kinds Of Privacy Interests Contemplated By Exemption 7(C).

While "[t]he question of the statutory meaning of privacy under the FOIA is, of course, not the same as the question whether . . . an individual's interest in privacy is protected by the Constitution," this Court's constitutional cases addressing an individual's right to privacy further indicate that the Third Circuit erred in its construction of the statute. See *Reporters Committee*, 489 U.S. at 762 n.13.

The Court has recognized that corporations have a Fourth Amendment right to be protected from unreasonable searches by the government, but at core, that right exists to protect individuals affiliated with a corporation, not the corporation itself. That is, in discussing the Fourth Amendment protections to which corporations are entitled, the Court has described the interest protected as the interests of the businessman, not of the entity. In discussing the purpose served by the Fourth Amendment in the context of the search of a business, the Court has explained that the Amendment was designed "to safeguard the privacy and security *of individuals* against arbitrary invasions by governmental officials." *Barlow's,* 436 U.S at 312 (internal quotation marks and citation omitted) (emphasis added). "The *businessman*, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *Dow Chemical Co. v. United States*, 476 U.S. 227, 237 (1986) (internal quotation marks and citation omitted) (emphasis added).

The Fourth Amendment cases also emphasize that as compared to an individual, a corporation enjoys fewer Fourth Amendment protections. Indeed, the Court has repeatedly recognized that "corporations can claim no equality with individuals in the enjoyment of a right to privacy" and that "neither incorporated nor unincorporated associations can plead an unqualified right to conduct their affairs in secret." See, e.g., *Morton Salt*, 338 U.S. at 652; *Cal. Bankers Ass'n v. Schultz*, 416 U.S. 21, 65 (1974).

To the extent that the purpose of creating privacy interests is merely to protect individuals, even in their capacities as directors, employees, or members of a corporation, extending exemption 7(C) to corporations does not serve that purpose. Such individuals are already protected by the plain terms of the Exemption, and it need not be extended to corporate entities to further that goal. In this case, it is undisputed that any information contained in the FCC's records may be withheld if it could reasonably be expected to constitute an unwarranted invasion of an individual's personal privacy. Indeed, the FCC withheld numerous records from disclosure on precisely this ground. See *SBC Commc'ns, Inc.*, 23 F.C.C.R. at 13,705.

By contrast, this Court has refused to grant corporations a Fifth Amendment privilege against self-incrimination. *White*, 322 U.S. at 698-99. The Court's analysis of the Fifth Amendment right dovetails precisely with the relevant considerations in this case.

In the Court's self-incrimination cases, the Court first recognized that "[t]he constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals. It grows out of the high sentiment and regard of our jurisprudence for conducting criminal trials and investigatory proceedings upon a plane of dignity, humanity and impartiality. It is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him." *Id.* In other words, the privilege against self-incrimination is inherently personal and designed to protect the dignity, humanity, and autonomy of real people, not artificial entities. Because the Court's paramount concern in the Fifth Amendment context is preserving a personal dignitary right, it has required custodians of corporate records to produce such documents when the "organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only." *Id.* at 701.

Moreover, the harms that might result from extending a Fifth Amendment privilege against self-incrimination to corporations are the same sorts of harms that would result if corporations were accorded privacy interests under FOIA. In *Braswell v. United States*, 487 U.S. 99, 115 (1988), the Court recognized that because "[t]he greater portion of evidence of wrongdoing by an organization . . . is usually found in the official records and documents of that organization," "effective enforcement of many federal and state laws would be impossible" if "the cloak of privilege [were] to be thrown around impersonal records and documents." (Internal citation and quotation marks omitted.) The Court concluded that allowing custodians to claim a Fifth Amendment privilege with respect to corporate records would "largely frustrate legitimate governmental regulation of such organizations." *Id.* at 116 (internal citation and quotation marks omitted). Just as extending a Fifth Amendment privilege to corporate custodians would frustrate "effective enforcement of many federal and state laws," creating privacy interests under FOIA would dramatically stifle the public's ability to understand whether its government is, in fact, effectively enforcing those laws against large, highly regulated, artificial corporate entities like AT&T.[6]

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[6] As noted by the government in its Reply Brief in Support of the Petition for Certiorari, *United States v. Martin Supply Co.* does not run afoul of these precepts. 430 U.S. 564 (1977). *Martin Supply* assumed, without deciding, that corporations are entitled to protection under the Double Jeopardy Clause. *Id.* at 570-76. To the extent that corporations enjoy such protections, they would serve the primary purpose of the Clause, "protect the integrity of final determinations of guilt or

In a parallel set of privacy cases, the Court has recognized an interest in "independence in making certain kinds of important decisions." *Whalen*, 429 U.S. at 598-600. These rights, too, seek to vindicate interests "central to personal dignity and autonomy." *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 851 (1992) (joint opinion). They include choices regarding marriage, procreation, contraception, family relationships, and child rearing and education. See, e.g., *Paul v. Davis*, 424 U.S. 693, 713 (1976); see also *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). In recognizing this right, the Court acknowledges individuals' fundamental humanity — it preserves "right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life" without interference from the State. *Planned Parenthood of Southeastern Penn.*, 505 at 851 (joint opinion). Plainly, these deeply personal and fundamentally existential rights simply do not translate to the corporate context. As such, these cases provide further indication that this Court's privacy jurisprudence is grounded in notions of individual dignity which do not extend naturally to corporations.

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innocence," *Sattazahn v. Pennsylvania*, 537 U.S. 101, 120 (2003) (internal quotation marks and citation omitted), by preventing the government from "taking the question of guilt to a series of persons or groups empowered to make binding determinations," *Swisher v. Brady*, 438 U.S. 204, 216 (1978).

C. The Theory Animating This Court's Corporate Speech Cases Provides Further Support For The Notion That Corporations Do Not Enjoy A Personal Privacy Interest Under FOIA.

Finally, this Court's understanding of the nature of corporate speech rights provides no support for the creation of a corporate personal privacy interest under FOIA because those cases are not grounded in theories of personhood, much less personal dignity. The Court's cases granting free speech rights to corporations focus on (1) the ability of the challenged speech to inform the public and (2) the rights of listeners to decide which speech prevails in the marketplace of ideas.

For example, in campaign finance cases, the Court protects a corporation's right to speak on the merits of a political referendum in order to preserve the societal interest in "free discussion of governmental affairs." *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 776-77 (1978). In *First National Bank of Boston v. Bellotti*, the Court explained that "[t]he inherent worth of the speech in terms of its capacity for informing the public" did not depend on the identity of the speaker. *Id.* at 776-77. Indeed, *Bellotti* specifically held that allowing free discussion was a "major purpose" of the First Amendment separate and apart from the "individual's interest in self-expression." *Id.* at 777 & n.12.

Thus, *Bellotti* and subsequent speech cases affirm that the corporate right to speak is grounded in the idea that citizens, not the government, shall decide what views carry the day in the marketplace of ideas. See *id.* at 777 n.12; *Consolidated Edison Co. of New York v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 533-535 (1980) (quoting, in part, *Abrams v. United States*, 250 U.S. 616, 630 (1919), "the best test of truth is the power of thought to get itself accepted in the competition of the market" and distinguishing the individual's right to self expression)); *Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561-62 (1980) ("Commercial expression . . . assists consumers and furthers the societal interest in the fullest possible dissemination of information."); *United States v. United Foods, Inc.*, 533 U.S. 405, 410-11 (2001) (holding that the First Amendment protects a societal interest in "the freedom resulting from speech in all its diverse parts" and recognizing that the "general rule is that the speaker and the audience, not the government, assess the value of the information presented").

The Court recently reaffirmed these principles in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010). In *Citizens United*, the Court explained that corporate speech is entitled to First Amendment protection because "[s]peech is an essential mechanism of democracy." *Id.* at 898. That is, the First Amendment protects not only individuals but a societal interest in "enlightened self-government." *Id.* In summarizing its corporate speech jurisprudence, the Court held that speaker-based distinctions are disfavored because "it is inherent in the nature of the political process that voters must be free to obtain information from diverse sources" in order to participate in the political process. *Id.* at 899.

Finally, the cases discussing disclosure of campaign contributions do not counsel in favor of extending a privacy right to AT&T here because that doctrine, too, seeks to protect individuals, not corporations. The Court has acknowledged that disclosure requirements may be unconstitutional as applied to an organization if there were a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed. *Id.* at 917.

Even if such a disclosure requirement could be held unconstitutional based on a showing of a threat to the entity itself, rather than its members, that conclusion would not suggest that the entity itself has privacy interests. Rather, the Court's freedom of association cases — upon which the disclosure cases rely — make clear that the doctrine intends to protect an *individual's* freedom to join with other individuals. For example, in *NAACP v. Alabama*, 357 U.S. 449 (1958), the NAACP brought suit against the state of Alabama to resist the state's order requiring the production of the NACCP's membership lists. *Id.* at 454. The Court recognized that the NAACP could assert "a right personal to [its members]" in being protected from "compelled disclosure by the State of their affiliation with the Association as revealed by the membership lists." *Id.* at 458; *see also id.* at 462 (referring to "a substantial restraint upon the exercise *by petitioner's members* of their right to freedom of association") (emphasis added); *id.* at 463 (referring to "the free exercise *by petitioner's members* of their constitutionally protected right of association") (emphasis added). But the FOIA statute as written already protects the privacy interests of any individuals who may be addition to this central Bureau, the FCC maintains three Regional Offices, sixteen District Offices, and eight Resident Agent Offices — all dedicated to the FCC's enforcement functions.[8] Other FCC offices also engage in enforcement of FCC rules. The Media Bureau "administers the policy and licensing programs relating to electronic media, including cable television, broadcast television, and radio in the United States and its territories."[9] The Wireless Telecommunications Bureau "handles all FCC domestic wireless telecommunications programs and policies . . . including licensing, enforcement, and regulatory functions."[10] The International Bureau "[m]onitors compliance with the terms and conditions of authorizations and licenses granted by the Bureau [and] pursues enforcement actions in conjunction with appropriate bureaus and offices."[11] Accordingly, enforcement activities span across every area of, and industry subject to, FCC jurisdiction.

Enforcement Bureau Website, http://www.fcc.gov/eb/ (last visited Nov. 11, 2010).

[8] For more information regarding the functions of these offices, *see* Federal Communications Commission Enforcement Bureau Website, http://www.fcc.gov/eb/rfo/ (last visited Nov. 11, 2010).

[9] Federal Communications Commission Media Bureau Website, http://www.fcc.gov/mb/ (last visited Nov. 11, 2010).

[10] Federal Communications Commission Wireless Telecommunications Bureau Website, http://wireless.fcc.gov-/index.htm?job=about (last visited Nov. 11, 2010).

[11] Federal Communications Commission International Bureau Website, http://www.fcc.gov/ib/functions.html (last visited Nov. 11, 2010).

The FCC receives hundreds of thousands of complaints each year pertaining to alleged industry violations of Commission rules.[12] Some of these complaints result in orders ascribing liability and exacting penalties on corporations that are deemed in violation of FCC rules. Some are dismissed. Others, like the case below, result in consent decrees where no liability is assigned, but a company nonetheless makes a voluntary "donation" to the U.S. Treasury. Still other complaints remain unresolved for months or even years with no explanation from the agency as to whether it has investigated or intends to resolve the claims at issue.

The public and organizations such as Free Press have legitimate and critical interests in how these enforcement activities are conducted, as well as how the agency interacts with the industries it regulates and whether the FCC enforces its rules. The fact that, in addition to protections directed at preserving personal privacy, FOIA also exempts from mandatory release "records or information compiled for law enforcement purposes" that "could reasonably be expected to interfere with enforcement proceedings," 5 U.S.C. §552(b)(7)(A), does not obviate the value of these records. Exposing how an agency has conducted itself with regard to enforcement activities remains a valid public interest even after such activities have concluded. For example, information garnered via a FOIA request can help illuminate the norms that are truly guiding agency action (or inaction) with respect to specific complaints or areas of enforcement. This information can shed light on questions of agency efficiency and resource allocation in handling such complaints; or it may reveal problems of agency capture by the industries it regulates.

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[12] Each year the Commission receives hundreds of thousands of complaints regarding indecent or obscene broadcasts *alone*. See, e.g. Chart of FCC Indecency Complaints and Notices of Apparent Liability 1993 – 2006, available at http://www.fcc.gov/eb/oip/ComplStatChart.pdf (last visited Nov. 13, 2010).

Given the critical role of enforcement in an agency like the FCC's oversight of industries under its jurisdiction, concealing information pertaining to these functions undermines the effectiveness and public value of FOIA.

B. The Court of Appeals' Creation Of A Corporate Personal Privacy Interest Undermines The Transparency Goals That FOIA Is Intended To Promote.

In creating a corporate personal privacy interest, the Third Circuit has managed to break new soil in thirty-six years of an otherwise solidly-grounded interpretation of FOIA Exemption 7(C). In doing so, it threatens to upset the foundation of well-established precedent and to put agency application of the Exemption in very shaky territory. It also threatens to shield from public scrutiny a significant portion of the FCC's regulatory activities.

In concluding that corporations, like humans, have "personal privacy interests," the Third Circuit suggested that a corporation "has a strong interest in protecting its reputation." *AT&T v. FCC*, 582 F. 3d 490, 498 (3d Cir. 2009). However, notwithstanding the Court of Appeals' novel understanding, there is nothing in the relevant legislative or case history to suggest that a corporation's reputational interest is a personal privacy interest under FOIA. See *infra* at Section I(A).

But most importantly, applying the Third Circuit's interpretation would produce results anomalous to the purpose of FOIA. For example, a corporation could argue that any record that it deems unflattering is harmful to its "reputation" and, thus, should be withheld under FOIA. Most enforcement proceedings are, by definition, fault-finding. A rule exempting all unfavorable enforcement records from disclosure could shield virtually all enforcement records from public view. Much of the information that agencies collect for the purpose of determining if a corporation has violated the law has the potential to cast a company in a negative light. Indeed, even information suggesting the mere existence of an investigation itself could be construed as adversely affecting a corporation's reputational standing under the Third Circuit's version of the exemption. Thus, the application of Exemption 7(C) as construed by the Third Circuit creates an unacceptably low standard for barring disclosure, and would have the effect of cordoning-off an entire subsection of critical agency activities from public scrutiny.

In any event, it is clear that access to these types of enforcement records is precisely what Congress envisioned when it amended Exemption 7 thirty-six years ago. Congress specifically considered and acknowledged the possibility that FOIA disclosures might result in the release of documents that cast a critical light on corporate actors. In 1974, Congress amended Exemption 7 to specifically narrow its scope. Prior to 1974, the statute allowed the government to withhold disclosure of all "investigatory files compiled by law enforcement purposes except to the extent available for law to a party other than an agency." See, e.g., *Aspin v. Dep't of Defense*, 491 F.2d 24, 25 n.3 (D.C. Cir. 1973) (quoting statutory text as it read prior the 1974 amendment).

In enacting the 1974 amendment, Congress expressed unease that the breadth of the prior language of Exemption 7 could be used to exclude the public from accessing records pertinent to agency oversight of regulated industries. According to Senator Hart, who introduced the amendment on behalf of himself and 14 cosponsors, Congress's concern was "that, under the interpretation by the courts in recent cases, the seventh exemption . . . den[ies] public access to information even previously available. For example, we fear that such information as meat inspection reports, civil rights compliance information, and medicare nursing home reports will be considered exempt under the seventh exemption." 120 Cong. Rec. 17,033 (1974) (statement of Sen. Hart).

Both a meat inspection report and documents regarding a telephone company's compliance with the FCC's administration of the E-Rate program could reflect poorly on a corporation's performance and reputation. In spite of this possibility, it is clear that Congress intended for citizens to be able to access such information under FOIA for the purpose of ascertaining if their government is investigating potential violations of the law and, more importantly, enforcing the law if and when such violations occur.

This does not mean that a corporation has no valid interest in maintaining the secrecy of certain types of information under FOIA. However, that interest is neither a personal or private one; instead its justification is rooted in purely economic concerns. In other words, a corporation does not have a cognizable *personal* interest in *privacy* relevant to FOIA — it has a *commercial* interest in *confidentiality*. But an expansion of Exemption 7(C) is not required to protect a corporation's legitimate proprietary interests in trade secrets or other commercially sensitive materials which, if disclosed, could subject the company to competitive harm. That interest is already amply protected under Exemption 4 of the FOIA. 5 U.S.C. §552(b)(4). Indeed, in the case below the FCC withheld various competitively sensitive documents under that exemption. *SBC Commc'ns, Inc.*, 23 F.C.C.R. at 13,705.

It is clear that under FOIA corporations already enjoy substantial protections for the types of competitively sensitive information for which they may have a commercial interest in withholding. Thus, an expansion of 7(C)'s personal privacy exemption is not required to further protect information in which a corporation may have a legitimate expectation of confidentiality. Moreover, creating a corporate personal privacy exemption that could shield from disclosure information pertaining to a significant share of government enforcement activities would substantially impair the societal and practical value of the FOIA in aiding the public's ability to hold its government accountable for execution and enforcement of our laws.

CONCLUSION

The Third Circuit's decision was flawed as a matter of law and fundamentally undermines the purpose of the FOIA statute. Its creation of corporate privacy interests cognizable under FOIA's Exemption 7(C) cannot be squared with this Court's privacy cases, which sound in concerns regarding individual dignity and autonomy. The decision also undermines the public's ability to "know what [its] government is up to." As a consequence, it hampers the public's ability to participate meaningfully in both public discourse regarding media and telecommunications policy and the related policymaking process at the Commission. The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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November 2010

AMICUS CURIAE BRIEF

No. 09-1279

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Petitioners,

v.

AT&T INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT AT&T INC.

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STATEMENT OF INTEREST OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF MANUFACTURERS

The National Association of Manufacturers (the "NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth, and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing in creating America's economic future and living standards.[1]

The NAM and its members have a vital interest in ensuring that manufacturers who find themselves caught up in a government investigation do not, as a result, have their private papers openly disseminated, thereby damaging their reputation, revealing their confidential communications, and causing competitive and other harm to themselves and their shareholders and employees.

As explained below, business entities, including corporations, create millions, perhaps billions, of messages and documents within the confines of the business organization each day. Most of them are not intended for dissemination to the public. Unless generated for some improper purpose, those documents would be regarded by virtually anyone as private to the organization. And there is absolutely no reason to believe that such documents lose their privacy and suddenly become available for public display, to aid competitors and potentially damage the reputation of the business entity that generated them, merely because a business entity has the misfortune of being swept up in a government civil or criminal investigation – as target or victim, or simply a source of information – which might involve thousands of messages being provided to the Government in aid of its investigation. No policy or law suggests or requires that result.

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[1] This *amicus* brief is filed with the written consent of the parties, on file in the clerk's office, in accordance with Rule 37.3(a). Pursuant to Rule 37.6, the NAM notes that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

DESCRIPTION OF THE ISSUES TO BE ADDRESSED BY *AMICUS CURIAE* NATIONAL ASSOCIATION OF MANUFACTURERS

This case concerns private papers of a business entity in the hands of the United States Government. They are there as the result of a government investigation. The question is whether those private papers, which the Government used its broad investigative power to obtain, have, once obtained by the Government, thereby been essentially placed into the public domain. Specifically, the question is whether those documents are subject to public disclosure for the asking by virtue of a Freedom of Information Act request, even if the information is indeed private, embarrassing, and harmful to the entity that created those papers, or to other business entities who may be mentioned in those papers.

The answer is "no." Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(C), creates an exception to FOIA disclosure for information compiled in the course of a government investigation if release of the information at issue could cause harm and embarrassment. Petitioners and their supporting Respondent CompTel posit that Exemption 7(C) does not apply if the harm or embarrassment will only befall a business entity, not a natural person. In the view of Petitioners and their supporting Respondent, the protection of privacy reflected in Exemption 7(C) is limited to the privacy of human beings, and thus categorically excludes any corporations, business entities, non-profit entities, associations and other similar entities from its reach. The Third Circuit held to the contrary, finding that the privacy of corporations is specifically within the reach of Exemption 7(C).

Because Petitioners' claim is that Exemption 7(C) does not apply to the private information of corporations in *any* circumstance, there is no occasion here to consider the limits of any privacy protection that Exemption 7(C) might afford to business entities in some specific factual setting. Petitioners' categorical position that Exemption 7(C) has no application at all requires this Court to assume, on the one hand, that there is no public interest in the disclosure of the information whatsoever, and, on the other, that the harm resulting from the disclosure will be extreme.

The theory advanced by Petitioners as to why such documents must be disclosed, notwithstanding the lack of public interest in the disclosure, the harm it will do, and the embarrassment it will cause, is that the harm and embarrassment will be inflicted on a business entity – a company, corporation, partnership, non-profit entity, or sole proprietorship – not an individual. And the rationale Petitioners offer to explain why such harm and embarrassment must be tolerated rests almost entirely on an asserted textual analysis of the words "personal privacy" in Exemption 7(C).

On the one hand, the FOIA, by its terms, extends its protections to corporations, companies and businesses. 5 U.S.C. § 552(b)(4); *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 152-53 (D.C. Cir. 2006) (affirming FDA's decision to redact names of companies as well as individuals who worked on the approval of mifepristone as an abortion drug). It defines "person" expressly to include business entities, including corporations. 5 U.S.C. § 551(2). Indeed, in other provisions of the FOIA, Congress explicitly used the term "person" to refer to corporations. *E.g.*, 5 U.S.C. § 552(b)(4) (exemption for "trade secrets and commercial or financial information obtained from a person and privileged or confidential"). And thus the use and reach of the adjectival phrase, "personal," in Exemption 7(C) would likewise seem naturally to include corporations and other business entities, clarifying that this exemption was not concerned about governmental privacy. Finally, Congress did not use any phrase in Exemption 7(C) – such as "individual" – that would have unambiguously eliminated business entities from the scope of coverage.

On the other hand, Petitioners argue that the usual connotations and usages of the word "personal," and the combination of words, "personal privacy," are strong enough to limit the scope of the exemption to the privacy interests of individual human persons, rather than persons as defined by the FOIA.

The NAM believes that Respondent AT&T and the Third Circuit have the better side of the debate regarding the meaning of the statutory language, given the definitional provisions of the FOIA.

But even if Petitioners' reliance on a customary connotation of "personal" and "personal privacy" were sufficient to create doubt or ambiguity about the meaning of Exemption 7(C) as an abstract matter, that should make no difference to the outcome here, given the basic interests at stake, and the essential purposes and limits of the FOIA.

This brief thus focuses on two overriding concerns: (1) the understanding that business entities have a legitimate entitlement to privacy in their day-to-day operations; and (2) the principle that the Government's investigative powers should not be used to serve private interests or to cause unnecessary reputational or market harm to subjects or witnesses in government investigations. In light of those concerns, which we describe in broad terms below, it should be impossible to read the addition of the word "personal" to the word "privacy" to reflect a specific intention on the part of Congress to deem the privacy interests of corporations unworthy of protection under Exemption 7. Specifically:

1. There should be no ground for dispute or disagreement that a corporation or business entity has privacy interests long regarded as worthy of protection. The NAM believes that such interests – the business entity's "reasonable expectation of privacy" – would be acknowledged and understood by virtually everyone as a matter of common experience, common usage, and ordinary parlance. Every day, millions upon millions of documents and messages are created within the confines of corporations and other business entities. Those documents would be widely recognized as private and confidential, not merely because of some indirect effect their release might have on individuals, but as respects the privacy right

of the entity itself. The point is easily illustrated at the outset.

To choose one type of example, one might expect a broad government investigation, implemented through a subpoena or investigative demand, to result in numerous e-mails, pieces of correspondence, notes, and writings ending up in the hands of the Government. Within the confines of a business organization, including a corporation, one might expect to find candid communications among and between the employees on an enormous range of topics bearing on the business and internal workings of the corporation.

The materials submitted to the Government in this context may contain critical comments about a customer or a supplier – or perhaps about some local or national regulator or politician. The subject of the comment might be the competence (or lack thereof) of some group or department within the company, or perhaps of the company as a whole. The commentary might address how the company treats its employees. It may constitute a serious attempt on the part of the company to engage in a self-critical examination intended to reduce the environmental impact of its operations, or to improve its retention of minority employees.

The comments might be brutally candid. They may even be in bad taste. The comments may include facts, opinion, hypothesis, speculation, derision or sarcasm. They may reflect intra-company rivalry or infighting. They may include commentary, the expression of which is beneficial to the functioning of the company, but they may also include communications that are in violation of the company's own internal policies.

In the hands of a competitor or a third party, including the press or trial lawyers, such materials could be deployed to harm the company and thereby its shareholders and employees. Their dissemination could destroy the reputation of a company or business, rendering the company a subject of public ridicule or worse, or could interfere with a valuable business relationship of the company. If selectively released, they could be used to generate a false impression about the nature of the company, its business, its competence, or its purpose. By affecting the company's public image, such releases could have a dramatic effect on its economic fortunes, and, in turn, on those of its shareholders and employees.

The important point that such a scenario illuminates for this case is that virtually everyone would regard such materials, in common parlance and usage, as private – beyond the scope of prying eyes, except for some very good reason. It is difficult to imagine that we would expect such information, through the power of the Government, to be gathered up and made available to competitors, the press, and other persons to do with that material as they will.

2. Equally important is the recognition that our constitutional system reflects a deep suspicion of the potential for abuse inherent in the Government's exercise of its broad investigative power. Indeed, one might view that suspicion as a cornerstone of our Constitution.

The Government's investigative power over documents is broad in pursuit of the public interest and legitimate areas of public inquiry and investigation. But it has always been regarded as improper and abusive for the Government's broad investigative power to be used to serve private ends and cause private injury.

That balance is reflected in the Freedom of Information Act generally, and Exemption 7(C) in particular, which imposes special limits on the Government's disclosure of information associated with law enforcement. FOIA's "basic policy . . . focuses on the citizens' right to be informed about what their government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989), citing *EPA v. Mink*, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting) (quotation omitted). It "does not create an avenue to acquire information about other private parties held in the government's files." *Painting Indus. of Haw. Market Recovery Fund v. U.S. Dep't of Air Force*, 26 F.3d 1479, 1484 (9th Cir. 1994), citing *Reporters Comm.*, 489 U.S. at 772-73. That principle underlies Exemption 7(C), and it applies just as strongly to information about private companies as it does to information about other private parties who happen to be subject to a government investigation.

SUMMARY OF ARGUMENT

Even assuming that there is some ambiguity about the scope of Exemption 7(C) based on its plain language, any doubts about the meaning of that exemption should be resolved in favor of finding that private information of business entities in the hands of the Government as a result of government law enforcement activities is not automatically subject to disclosure. To require disclosure of such information would be inconsistent with the basic purpose, and the limits, of the FOIA generally, as well as the evident purpose, and limits, of Exemption 7(C) in particular.

Business entities have a privacy interest for internal communications that virtually any modern observer would readily recognize as worthy of respect. That interest should be recognized for a wide range of communications intended to be confidential, and which, if released, could damage an entity's reputation or its fortunes, with consequences for its managers, owners, and employees. The NAM has identified above a range of circumstances and situations in which internal e-mails, correspondence, reports and other documents would easily be regarded as fundamentally private by any modern observer. And this Court's cases, particularly the cases interpreting the Fourth Amendment, have long accepted the formal proposition that a business entity has an interest in privacy that warrants respect.

The FOIA as a whole reflects no interest or intention to invade the communications and documents of private parties, of any sort. To the contrary, the FOIA has long been understood as a window into the inner workings of the Government. Exemption 7(C) must be construed in a manner consistent with that understanding.

Exemption 4 to the FOIA does not exhaust the business entities' privacy interest. There are, as described above, many types of documents and communications that could easily fall into the hands of the Government in connection with a government investigation that almost anyone would regard as private, but would not fall within the parameters of Exemption 4. Exemption 4 is an exemption from FOIA disclosure for traditional financial or trade secret material, no matter how the information has come into the hands of the Government.

In contrast, Exemption 7(C) provides a broader protection primarily for documents and information that fall into the hands of the Government on account of the Government's exercise of its law enforcement authority. The Constitution, and this Court's cases – as well as popular sentiment – have long reflected a suspicion and concern about the potential for misuse of the Government's investigative powers. Those powers are extremely broad in pursuit of legitimate law enforcement objectives. But it is equally clear that allowing the happenstance that one's private documents have come into the hands of the Government as part of a government investigation to result in their being accessed and used by other private parties, in order to cause reputational damage, is not a legitimate law enforcement objective. There is no dispute about the mischief or great harm that might result from the release of such documents. And there is no reason to construe Exemption 7(C) to allow such mischief and such harm.

ARGUMENT

I. CORPORATIONS ENJOY EASILY RECOGNIZABLE PRIVACY INTERESTS BEYOND THOSE PROTECTED BY EXEMPTION 4.

That corporations and other business entities are entitled to privacy is not truly disputed by the parties in this case. Nor could there properly be such a dispute. This Court has long used the term "privacy" to describe the interest of a corporation or business entity in protection from unreasonable searches and seizures under the Fourth Amendment. *See, e.g.*, *Dow Chem. Co. v. United States*, 476 U.S. 227, 235 (1986) ("Plainly a business establishment or an industrial or commercial facility enjoys certain protections under the Fourth Amendment."); *Kewa-*

nee Oil Co. v. Bicron Corp., 416 U.S. 470, 487 (1974) ("A most fundamental human right, that of privacy, is threatened when industrial espionage is condoned or is made profitable."); *Hale v. Henkel*, 201 U.S. 43, 76 (1906) ("[A] corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body, it waives no constitutional immunities appropriate to such body."), *overruled in part on other grounds by Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52 (1964).

Indeed, Petitioners and various *amici* acknowledge that corporations have a legitimate interest in maintaining the secrecy and confidentiality of information. They argue, however, that Exemption 4 of the FOIA, addressing "trade secrets and commercial or financial information obtained from a person and privileged or confidential," 5 U.S.C. § 552(b)(4), exhausts that interest under the FOIA. *See* Brief of Petitioners at 24-27; Brief of Respondent CompTel at 29-31; Brief for Reporters Comm., *et al.* as *Amici Curiae* Supporting Petitioners at 13-18; Brief for Const'l Accountability Center as *Amicus Curiae* Supporting Petitioners at 18.

But there is no reason to believe that this is true. Exemption 4 is a generalized exemption that maintains traditional trade secret and confidentiality privileges that often attach to commercial and financial information. It applies generally to information held by the Government. (In contrast, as explained below, Exemption 7(C) is a limitation specially applicable to information compiled for law enforcement purposes.) Exemption 4 simply does not encompass all documents that would be deemed confidential and private. In particular, relying on the "plain meaning" of the terms "commercial" and "financial" in interpreting the language of Exemption 4, the lower courts have concluded that Exemption 4 does not protect against the risk of reputational harm—the very type of harm that Exemption 7(C) *was* intended to prevent. [2]

Exemption 7(C) rests on a different footing. It is a particularized exemption for documents and information compiled in the course of government investigations. It is hardly irrational to believe that Congress would have wanted to protect a broader class of privacy interests, and guard against a wider range of harms, in connection with documents and information that end up in the hands of the Government as a result of the exercise of the Government's law enforcement powers. There is, as noted below, a traditional repugnance to allowing the Government's law enforcement powers to be used for private purposes.

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[2] *See United Tech. Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 564 (D.C. Cir. 2010) ("Exemption 4 does not guard against mere embarrassment in the marketplace or reputational injury. . . ."); *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1154 (D.C. Cir. 1987) (risk of unfavorable publicity or employee demoralization as result of releasing company reports to agency concerning hiring and promotion of women and minorities insufficient to warrant withholding under Exemption 4); *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983) ("Competitive harm should not be taken to mean simply any injury to competitive position, as might flow from customer or employee disgruntlement or from the embarrassing publicity attendant upon public revelations concerning, for example, illegal or unethical payments to government officials or violations of civil rights, environmental or safety laws.") (quotation omitted); *Bloomberg L.P. v. Bd. of Governors of Fed. Reserve Sys.*, 649 F. Supp. 2d 262, 280 (S.D.N.Y. 2009) ("[T]he risk of looking weak to competitors and shareholders is an inherent risk of market participation; information tending to increase that risk does not make the information privileged or confidential under Exemption 4."); *In Def. of Animals v. U.S. Dep't of Agriculture*, 587 F. Supp. 2d 178, 182 (D.D.C. 2008) (finding expert testimony on tactics of animal rights' groups designed to harm company's business irrelevant to issue of whether Exemption 4 applied to protect investigatory files of company on alleged violations of Animal Welfare Act, because any harm posed by such tactics "is akin to the reputational harm caused by negative publicity that . . . is irrelevant to the competitive harm inquiry under Exemption 4.").

Thus, Exemption 7(C) affords a broader protection of privacy to law enforcement files than, for example, the privacy protections provided under Exemption 4 or even Exemption 6. In connection with documents and information associated with law enforcement, Congress exempted any and all information that "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

In particular, Exemption 7(C) recognizes that persons caught up in government investigations, whether as suspects or witnesses, have a "strong interest" in not being associated unwarrantedly with alleged criminal activity. *Computer Prof'ls for Soc. Responsibility v. U.S. Secret Serv.*, 72 F.3d 897, 904 (D.C. Cir. 1996); *see also Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 894 (D.C. Cir. 1995) ("third parties who may be mentioned in investigatory files" and "witnesses and informants who provided information during the course of an investigation" have an "obvious" and "substantial" privacy interest). Such subjects, witnesses and informants may include business entities as well as individuals. *See DOJ v. Landano*, 508 U.S. 165, 175 (1993) ("The FBI collects information from a variety of individual and institutional sources during the course of a criminal investigation."). No less than individuals, companies that are uncharged targets of investigations or are cooperating with investigators can suffer the same harms of reprisal, harassment, and the stigma of being associated with an investigation if their identities and confidential internal communications are subject to public disclosure.

Indeed, under any construction of Exemption 7(C), it is surely intended to cover, in the context of law enforcement records, some broader class of privacy interests than are specifically shielded and defined elsewhere in the FOIA.[3] As shown below, there is every reason to believe that in the context of Exemption 7, Congress would have wanted to ensure that the Government's exercise of its investigative powers, as respects the private documents and information of people or business entities, did not become the vehicle for private mischief.

In the introductory section of this brief, the NAM described some of the types of documents likely to be found in the filing cabinets, hard drives, servers, and backup tapes of a modern business entity. There is little doubt that the candid comments of company employees on company policy, company performance, and the performance of peers, bosses, regulators, customers, suppliers, and others would be regarded as private. Moreover, there is little doubt that such information is generated routinely with the understanding that the information ordinarily would not be revealed, and that virtually every citizen would understand such communications to be private.

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[3] CompTel erroneously asserts that "[i]f Exemption 7(C) were interpreted to protect corporate interests, corporations would be given broader protections during the consideration of whether to release law enforcement records than individuals are given during the consideration of whether to release their medical files" under Exemption 6, and that this "can hardly be what Congress intended." Brief of Respondent CompTel at 25. This argument makes no sense. Individuals have a broad exemption from the release of medical information that is in the hands of the Government for whatever reason. But with respect to the information that is in the hands of the Government through the exercise of its investigative power, the individual has under Exemption 7(C) the same broad protection as corporations.

It is also easy to identify other types of documents that are more formal and more serious – but every bit as private. Though we are all accustomed to a great deal of public disclosure about the governance of large public companies, most companies are not public. The internal governance and decision-making processes of close corporations, partnerships, and a wide range of other entities are typically secret, for good reason.

So too, it would be unsurprising that a corporation or other business entity might find it useful to do some self-critical evaluation or investigation as part of a corporate compliance program. Such programs and evaluations are done with the best of intentions, rooting out errors in order to correct them now and prevent them in the future. They are almost certainly to be encouraged. But the reports of such investigations, depending on what they uncover, could easily be regarded as embarrassing. (Indeed, when, through some leak, such reports do find their way into the public domain, and into the newspapers, they are generally regarded as embarrassing.)

Almost anyone would recognize a significant degree of privacy associated with all such categories of corporate documents. (Moreover, it does not appear that any of those categories of documents would be protected under Exemption 4.) To the extent that there are close questions about whether such documents really should be accessible through an FOIA request because they reveal something important about the workings of the Government, that can and would be determined on a case-by-case basis. But unless those privacy interests are recognized under Exemption 7(C) in the first instance, there will be no occasion for such balancing.

II. THE GOVERNMENT'S INVESTIGATIVE POWERS SHOULD NOT BE USED TO SERVE PRIVATE ENDS, OR TO CAUSE HARM OR EMBARRASSMENT UNRELATED TO PROPER INVESTIGATIVE PURPOSES.

The desire to curb the potential for abuse that inheres in the basic power of the Government to investigate has a significant role within our constitutional tradition. It may fairly be said to underlie, among other things, the Fourth Amendment to the Constitution.

Notwithstanding the Fourth Amendment, the power of the Government to investigate both regulatory violations and crimes remains broad. And corporations and business entities are often involved in civil, regulatory and criminal investigations.

Exemption 7 extends broadly to documents and other information compiled in the course of such investigations by a wide array of government agencies. *Mittleman v. Office of Pers. Mgmt.*, 76 F.3d 1240, 1243 (D.C. Cir. 1996) ("We have held that the term 'law enforcement purpose' is not limited to criminal investigations but can also include civil investigations and proceedings in its scope."); *Rural Hous. Alliance v. U.S. Dep't of Agric.*, 498 F.2d 73, 81 n.46 (D.C. Cir. 1973), quoting H.R. Rep. No. 1497 (1966) ("This exemption covers investigatory files related to enforcement of all kinds of laws, labor and securities laws as well as criminal laws. This would include files prepared in connection with related Government litigation and adjudicative proceedings.").

Government agencies may compel the disclosure of corporate documents in many ways – through search warrants, grand jury subpoenas, agency subpoenas, criminal and civil investigative demands, and informal requests for documents or information. It is not uncommon for government agents, armed with a warrant, to seize entire computers, taking with them everything on the owner's hard drive or server. Such requests, in aid of legitimate government purposes, invariably will sweep within them scores of documents that are largely or entirely unrelated to any investigatory purpose.

Administrative agencies are frequently vested with broad investigatory power and the discretion to require the disclosure of any information concerning matters within their jurisdiction. *See, e.g., Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943) (district court must enforce administrative subpoena unless the evidence sought was "plainly incompetent or irrelevant to any legal purpose" of the agency). Courts will enforce an administrative agency's subpoena unless it is "unreasonably burdensome." *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984).

Because a corporation must comply with a subpoena unless it is unreasonably burdensome, such that it "threatens to unduly disrupt or seriously hinder normal operations of a business," *United States v. Chevron U.S.A., Inc.*, 186 F.3d 644, 649 (5th Cir. 1999), the corporation cannot withhold documents merely because the documents could be viewed as inflammatory or advantageous to its competitors if they were to fall into the wrong hands. Government agencies are given the leeway to define the scope of their own investigations, much as a grand jury is. Thus, it is not an exaggeration to say that the Government can (and does) collect embarrassing e-mails and competitively damaging documents from corporations – although only tangentially, if at all, relevant to the Government's investigation.

Moreover, the mere fact that a company is the subject of a government subpoena or investigative demand or simple request carries with it no suggestion that the company has engaged in any wrongdoing whatsoever. The Government is entitled to pursue potential evidence of wrongdoing, even in the hands of wholly innocent parties, including parties who are not a target of any inquiry.

It is against the backdrop of this understanding of the Government's broad investigative authority that Exemption 7 should be interpreted. Petitioners and their supporters have invoked the history of that exemption, but have failed to draw the most obvious inferences from it.

As initially enacted, Exemption 7 provided broadly that the FOIA would not reach "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." 81 Stat. 54 (1967). As such, the FOIA could not have been a tool for the type of request at issue in this appeal. The FOIA simply was not a vehicle for allowing private parties access to the private documents of private companies, or comments on such subjects, if created or acquired by the Government in connection with a government investigation. The fact that documents or information had been gathered by the Government, and were in the Government's hands as the result of a government investigation, did not make those documents vulnerable to release to private parties who might seek to take advantage of those documents for competitive advantage, malicious purposes, or otherwise.

But the broad application of Exemption 7 led to concerns that by invoking the words "law enforcement" as a justification for withholding information, the Government could frustrate the public's ability to gain insight into the inner workings of the Government that the FOIA was intended to foster. In response, Congress narrowed the scope of Exemption 7. *See FBI v. Abramson*, 456 U.S. 615, 621 (1982) (attributing the 1974 amendments to the "sweeping interpretation given the Exemption by some courts [that] permitted the unlimited withholding of files merely by classifying them as investigatory files compiled for law enforcement purposes").

With respect to this history, the question here is thus whether there is any indication that Congress intended to allow documents, and other private information gathered from private companies, to be available to competitors and the public. At least judging from the legislative history and commentary cited by Petitioners and their supporters, there is no such indication.

To the contrary, as a general matter, Exemption 7(C), which exempts from disclosure information that "could reasonably be expected to constitute an unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(7)(C), suggests an opposite purpose and concern.

Exemption 7(C) is most naturally interpreted in light of the basic structure and purposes of the Freedom of Information Act as a whole. This Court has declared repeatedly that FOIA's "basic policy . . . focuses on the citizens' right to be informed about what their government is up to." *Reporters Comm.*, 489 U.S. at 773, citing *Mink*, 410 U.S. at 105 (Douglas, J., dissenting) (quotation omitted); *see also U.S. Dep't of State v. Ray*, 502 U.S. 164, 177 (1991); *Dep't of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976). Indeed, the Court since has reaffirmed that "the *only* relevant public interest in the FOIA balancing analysis" is "the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" *U.S. Dep't of Def. v. FLRA*, 510 U.S. 487, 497 (1994) (emphasis added) (quoting *Reporters Comm.*, 489 U.S. at 773); *accord*, *Bibles v. Or. Natural Desert Ass'n*, 519 U.S. 355, 356 (1997). The Freedom of Information Act embraces the objective of providing a clear window into the workings of the Government through which the actions *of the Government* can be assessed.

In light of that overriding purpose, disclosure of internal corporate documents in the hands of the Government may be compelled only if such disclosure would further the "core purpose" of FOIA: that of "open[ing] agency action to the light of public scrutiny" and thereby advancing "public understanding of the operations or activities of the government." *Reporters Comm.*, 489 U.S. at 774-75 (internal quotation marks and emphasis omitted). In *Reporters Committee*, this Court drew a sharp distinction between official government information, the disclosure of which furthers that central purpose, and information about private persons, which ordinarily does not:

> Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.

Id. at 773. In short, "FOIA's central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed." *Reporters Comm.*, 489 U.S. at 774.

It follows that when third parties seek law enforcement records concerning private citizens that would shed no light on the activities of government agencies or officials, "the FOIA-based public interest in disclosure is at its nadir." *Id.* at 780. "[I]n the typical case in which one private citizen is seeking information about another—the requester does not intend to discover anything about the conduct of the agency . . . . [A] response . . . would not shed any light on the conduct of any Government agency or official." *Id.* at 773. The public interest in compelled disclosure of internal corporate communications or other private documents that the Government may have collected in the course of an investigation is "negligible, at best," because it "would not appreciably further the citizens' right to be informed about what their government is up to." *Dep't of Defense*, 510 U.S. at 497 (citation omitted); *see id.* at 500 (finding a "virtually nonexistent FOIA-related public interest in disclosure"). If a third party requests law enforcement records or information about a private party that contain no "official information" about a government agency, but "merely records that the Government happens to be storing," such a request may be categorically denied without the need to undertake a balancing of interests. *Reporters Comm.*, 489 U.S. at 780.

In short, the FOIA "does not create an avenue to acquire information about other private parties held in the government's files." *Painting Indus. of Haw. Market Recovery Fund*, 26 F.3d at 1484, citing *Reporters Comm.*, 489 U.S. at 772-73. Private parties' interest in learning about the activities of other private parties "is not the sort of public interest advanced by the FOIA." *Hopkins v. U.S. Dep't of Hous. & Urban Dev.*, 929 F.2d 81, 88 (2d Cir. 1991).

Consistent with these principles, this Court repeatedly has refused to compel disclosure of personal information of private persons that happens to be in the Government's possession. As the Court observed in *Reporters Committee*, "it should come as no surprise that in none of our cases construing the FOIA have we found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen." 489 U.S. at 774-75. *See, e.g.*, *Bibles*, 519 U.S. at 355-56 (protecting names and addresses of individuals receiving Bureau of Land Management newsletter); *Dep't of Defense*, 510 U.S. at 497-502 (protecting home addresses of federal civil service employees because, although disclosure of the addresses might allow unions to communicate more effectively with bargaining unit employees, it "would reveal little or nothing about the employing agencies or their activities"); *Ray*, 502 U.S. at 173-79 (protecting reports of interviews with Haitian deportees which included identifying information; public interest in knowing whether State Department had adequately monitored Haiti's compliance with its promise not to prosecute returnees was adequately served by disclosure of redacted interview summaries).

In sum, there is no suggestion that the FOIA was intended to provide a window into the workings of private companies, unless perhaps as an incident to the larger purpose of providing some real insight into the workings of the Government itself (in which case such purpose would become a factor in the ensuing balancing process). And that principle extends easily to Exemption 7(C). There was no intention on the part of Congress to allow the Government's investigative power to become the vehicle for one private party to gain access to the private papers and information of another. That principle extends just as naturally to information about private companies as it does to information about any private citizen that happens to be caught up in a government investigation.

Indeed, there is a longstanding tradition that the Government's exercise of its broad investigative power should not be used to serve collateral ends. The coercive power of the Government in the law enforcement context ought not to be subverted to private ends, whether directly or indirectly. Moreover, it is desirable to encourage broad compliance with government investigations; it is conversely undesirable to make business entities reluctant to provide documents and information to the Government for fear that, once released to the Government, they will become available to the world at large through the FOIA. The happenstance of the Government's exercise of its investigative power over a particular entity should not become the vehicle for one private party to gain an advantage over another.

For example, this Court has historically limited the use of the grand jury's subpoena power to the service of the investigatory ends for which the power was created, declining to allow it to be employed to serve collateral objectives. *See United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 432 (1983) ("[D]isclosure to government attorneys for civil use poses a significant threat to the integrity of the grand jury itself. If prosecutors in a given case knew that their colleagues would be free to use the materials generated by the grand jury for a civil case, they might be tempted to manipulate the grand jury's powerful investigative tools to root out additional evidence useful in the civil suit . . . . Any such use of grand jury proceedings to elicit evidence for use in a civil case is improper *per se*."); *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 218-19 (1979) ("[W]e have noted several distinct interests served by safeguarding the confidentiality of grand jury proceedings. First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. . . . Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.").

The same basic considerations apply to all forms of government investigation: The power to investigate is broad in aid of the proper subjects of investigation. It is fundamentally improper to employ that vast power for other ends – or, whether intentionally or not, to allow it to be used for those ends. It is thus difficult to conceive support for the notion that Congress, with the FOIA, intended to allow the Government's investigative power to be the vehicle for private parties to do mischief to one another, whether in some competitive context, or for some malicious purpose.

To be sure, Petitioners' supporters suggest that company documents that end up in the hands of the Government, if then made available to the public through the FOIA, can, on occasion, provide valuable insights to journalists and others on the internal workings of corporations and business entities. And there is no need to doubt that there is some public interest in how companies and business entities operate. Still, there is no reason to believe that *the FOIA* was intended to foster and facilitate such studies. As this Court has explained, "There is, unquestionably, some public interest in providing interested citizens with answers to their questions about [a private party]. But that interest falls outside the ambit of the public interest that the FOIA was enacted to serve." *Reporters Comm.*, 488 U.S. at 1483.

On the other hand, no one can doubt the advantage and opportunity for mischief and malice that would be created under the construction of Exemption 7(C) suggested by Petitioners. The FOIA would provide a company or private citizen a tool of infinite possibility for harm if, for example, a competitor were to find itself caught up in a government investigation, with the Government gaining possession of some mass of its confidential internal documents – thereby rendering the documents available for dissemination. They could be examined for insights into business plans or to identify disgruntled employees, and searched for strategic weaknesses. The information could then be spread to potential customers, suppliers, or investors, perhaps doing permanent harm, or at least making life more difficult and complicated for the company whose documents and confidential communications ended up in the hands of the Government. The information – even if truthful – could be spread purely for malicious purposes, or, more specifically, to undermine the reputation of the entity. Likewise, it could be spread around for purportedly benign purposes, perhaps to advance a political objective or an academic study, but nonetheless cause reputational and other harm.

The real question in this case is why the FOIA should be interpreted to allow such harm. And the answer is that it should not be.

CONCLUSION

The judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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December 15, 2010

AMICUS
CURIAE
BRIEF

Supreme Court, U.S.
FILED
NOV 16 2010
OFFICE OF THE CLERK

No. 09-1279

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Petitioners,

v.

AT&T, INC. ET AL.,
Respondents.

CORRECTED COPY

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

Brief for the Project On Government Oversight, the Brechner Center for Freedom of Information, and Tax Analysts as Amici Curiae in Support of Petitioners

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Question Presented

Under Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(C), law-enforcement records are exempt from mandatory disclosure to the extent that their disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." The word *person* as used in FOIA is defined to include corporations.

The question discussed in this brief is whether the word *personal* is merely the "adjectival form" of the noun *person*, so that given *person*'s definition, *personal privacy* should be interpreted here to mean *corporate privacy*, or whether *personal* instead has a distinct meaning of its own that is unaffected by FOIA's treatment of corporations as persons.

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Interest of Amici Curiae[1]

Amici are organizations with a strong interest in preserving and enhancing the effectiveness of the Freedom of Information Act as a tool in ensuring open government.

The Project On Government Oversight (POGO) is a nonpartisan independent watchdog organization that promotes good-government reforms. POGO investigates corruption, and conflicts of interest in the federal government, and in doing so it relies on the Freedom of Information Act. POGO has found that in many cases, the nondisclosure of government records has to do with hiding corruption, intentional wrongdoing, or gross mismanagement by the government or its contractors. That problem would be greatly magnified if the Third Circuit's decision in this case were to be affirmed. (Additional information about POGO can be found at POGO's website, www.pogo.org.)

The Brechner Center for Freedom of Information is a unit of the College of Journalism and Communications at the University of Florida. Its mission is to advance understanding, appreciation and support for freedom of information in Florida, and thereby to foster open government and participatory democracy. In addition, the Center serves as a resource for journalists, lawyers, and members of the public by providing information about freedom of information and access to government information. (Additional information about the Brechner Center can be found at www.brechner.org.)

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[1] No party's counsel authored this brief in whole or in part. No monetary contribution intended to fund the preparation or submission of this brief was made by any party or any party's counsel. Nobody other than amici or their counsel has made any such contribution. Letters evidencing the parties' consent to the filing of this brief have been lodged with the Clerk.

Tax Analysts is a leading publisher of tax news and analysis, serving over 150,000 tax professionals in law and accounting firms and government agencies, as well as the taxpaying public generally. Through periodicals such as Tax Notes, State Tax Notes and Tax Notes International and its website, www.taxanalysts.com, Tax Analysts provides a wide range of information and resources on taxation issues. Since its founding in 1970 as a non-profit organization, Tax Analysts has used the FOIA to obtain and disseminate information on tax policy and the Internal Revenue Service's administration of tax laws.

Introduction and Summary of Argument

This case is regarded by many as a follow-up to *Citizens United v. Federal Election Commission*.[2] That is to say, it is regarded as a case raising questions about the scope of corporate "personhood." But the decision below rested primarily on textual grounds. The Third Circuit held that because FOIA defines *person* as including corporations, the phrase *personal privacy* in Exemption 7(C) includes corporate privacy as well as individual privacy. That conclusion was mistaken, and as a result the Court need not reach the broader question of what rights corporations do or do not enjoy.

Neither the phrase *personal privacy* nor the word *personal* is defined in FOIA, so in the absence of anything suggesting otherwise, the meaning of *personal privacy* "has to turn on the language as we normally speak it[.]"[3] By that measure, personal privacy is something that can be possessed only by human beings.

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[2] 130 S. Ct. 876 (2010).

Nevertheless, AT&T argues (and the Third Circuit held) that *personal privacy* should be interpreted here as *corporate privacy*. That conclusion is based on the theory that the meaning of the word *personal* as is used in FOIA is governed by the definition of the word *person* as including corporations.[4] According to AT&T, *personal* is the "adjectival form" of the noun *person* and as a result, its meaning is necessarily affected by the definition of *person*. As we will show, AT&T's argument is mistaken.

To begin with, *personal* is not the "adjectival form" of *person*. The suggestion that an adjective can be a form of a noun makes little sense; presumably what AT&T means is that *personal* is derived from *person*. But that is wrong as a matter of etymology: *personal* entered the English language separately from the word *person*. Both were borrowed from French, where they had evolved from the Latin words *personalis* and *persona*, respectively. And although those Latin words had a common origin, that fact does not provide any reliable clue as to what the English word *personal* means now.

Moreover—and more important—in the 700 years since the first attested use of *personal* in English, the word has evolved on a semantic trajectory of its own. It is therefore a mistake to treat the meaning of *personal* as nothing more than the sum of the meanings of its parts: the noun *person* plus the suffix *-al*. It is clear from both from dictionary definitions and actual usage that there is more to the meaning of *personal* than simply "of or pertaining to a particular person." The word's meaning—as revealed by the contexts in which it is used—is such that it seems to be used exclusively with reference to human beings.

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[3] *Watson v. United States*, 552 U.S. 74, 79 (2007). *See also, e.g.*, *Lopez v. Gonzales*, 549 U.S. 47, 53 (2006); *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995).

[4] 5 U.S.C. § 551(2).

For example, consider some of the ways in which *personal* is commonly used:

take personal responsibility for something
invade someone's personal space
cultivate personal relationships
a personal friend
take a personal interest in something
suffer a personal injury
ask a personal question
take offense at a personal remark
a personal opinion
for personal use only
do something for personal gain
do something as a personal favor
butting into someone's personal affairs
make a personal appearance
give personal attention of something
to have personal problems
have good personal hygiene
keep track of personal finances

Any fluent speaker of English would know that using these expressions in reference to a corporation would be anomalous. And these examples are not in any way unusual; as we will show, they are absolutely typical of how *personal* is used in real life.

Given the word *personal*'s strong semantic association with *human* persons, there is no reason to think that its meaning as used in Exemption 7(C) would change in response to how FOIA defines *person*. And that conclusion is not changed by the fact that we are dealing here with a legal context. *Personal privacy* is not a legal term of art, and the contexts in which it has been used by the courts and by commentators show that it has been used consistently with its everyday meaning. Similarly, the word *personal* has often been used by Congress in its ordinary, human-centric sense.

Argument

A. The meaning of *personal* is not dependent on the meaning of *person*.

1. *AT&T's interpretation cannot be justified on the basis of the argument that* personal *is the "adjectival form" of* person.

In order to evaluate AT&T's argument that *personal* is the "adjectival form" of *person*, one must first figure out what exactly an "adjectival form of a noun" is. It certainly is nothing like the plural form of a noun (*persons*) or the possessive form (*person's*): those forms are themselves nouns, while the "adjectival form" is not a noun but an adjective. To say *X is a form of a Y* is to say that X is a kind of a Y, and an adjective is not a kind of a noun.

So on a literal level, calling *personal* the adjectival form of *person* makes little sense. It is best understood, we think, as an imprecise way of saying that *personal* is derived from *person*—that it came into existence when the noun *person* was changed into an adjective by the addition of the suffix *-al*. Thus, AT&T's argument is essentially based on etymology. But it cannot be justified on that basis.

First, the English word *personal* was not in fact derived from the English word *person*. *Personal* entered the English language (in the 1300s) as a borrowing from Middle French of the word *personel*.[5] The latter word developed from the Latin word *personalis*, which in turn was derived from the Latin word *persona*.[6] So even if one restates AT&T's position as claiming that *personal* is derived from *person*, the claim is true only of those words' Latin precursors.

In interpreting Exemption 7(C), knowing the roots of the Latin word *personalis* more than a thousand years ago provides little help. Although this Court has on occasion discussed the etymology of a word in the course of interpreting a statute in which the word appears,[7] it has never suggested that the interpretation of statutes should turn on matters of linguistic ancient history. And the fact is that the origin of a word is not reliable evidence of its current meaning.[8] Word meanings often change over time, so what a word means today may be very different from what it meant in the distant past. For example—

meticulous originally meant "fearful, timid";[9]

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[5] *Oxford English Dictionary Online*, www.oed.com (Draft Revision Sept. 2010); *see also* 11 *Oxford English Dictionary* 599–600 (2d ed. 1989).

[6] See sources cited in note 5, *supra*.

[7] *E.g.*, *Muscarello v. United States*, 524 U.S. 125, 128 (1998).

[8] *E.g.*, Philip Durkin, *The Oxford Guide to Etymology* 27–31 (2009); Howard Jackson, *Lexicography: An Introduction* 126 (2002).

[9] *The Oxford Guide to Etymology*, *supra* note 8, at 28.

> *obnoxious* originally meant "exposed to harm, liable, answerable, submissive, subject to punishment";[10]
>
> *quaint* originally meant "wise, knowing, skilled, clever"; "cunning, crafty, given to scheming"; "cunningly or skillfully made"; "beautiful, pretty, dainty, handsome, fashionable, elegant"; or "proud, haughty";[11]
>
> *marshal* originally meant "person in charge of the upkeep of horses";[12]
>
> *knight* originally meant "boy, lad";[13]
>
> *magazine* originally meant "storehouse";[14]

and, of particular relevance here:

> *persona*, the Latin precursor of *person*, originally meant "character in a drama," "actor," or "mask worn by an actor."[15]

Thus, as lexicographer Sidney Landau has said, "Etymology may be valuable in its own right, but it tells us little about current meaning and is in fact often misleading."[16]

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[10] *Id*. at 29.

[11] *Id*. at 228–30.

[12] *Id*.

[13] *Id*. at 239.

[14] *Id*. at 244.

[15] *Webster's Third New International Dictionary* 1686 (1961/1993) ("*Webster's Third*"); Robert K. Barnhart & Sol Steinmetz, *Chambers Dictionary of Etymology* 780 (1999).

[16] Sidney I. Landau, *Dictionaries: The Art and Craft of Lexicography* 127 (2d ed. 2001).

2. *The current meaning of an adjective such as* personal *does not necessarily depend on the current meaning of the corresponding noun.*

While the English word *personal* is not derived from the English word *person*, the two words share a common origin in the Latin word *persona*. But the fact that two words share a common origin does not by any means guarantee that the words' current meaning are linked in the manner posited by AT&T.

This can be seen by looking at other adjectives whose origins, like *personal*'s, can be traced to a Latin adjective that was derived from a noun. Under AT&T's argument, each of these would be the "adjectival form" of the corresponding noun. But in many cases, the relationship between (at least one of) the adjective's current meanings and (at least one of) the current meanings of the corresponding noun is attenuated:

actual; corresponds to *act*
consensual; corresponds to *consensus*
crucial; corresponds to *crux*
genial; corresponds to *genius*
ideal; corresponds to *idea*
integral; corresponds to *integer*
local; corresponds to *locus*
partial (=not impartial); corresponds to *part*
special; corresponds to *species*
usual; corresponds to *use*
verbal; corresponds to *verb*
virtual; corresponds to *virtue*

In none of these cases can the adjective's meaning be broken down into the template [*NOUN* + *-al*].

To be sure, there are adjectives whose meanings do conform more closely to that template, such as *governmental*, *departmental*, and *accidental*. If AT&T's argument were directed at those words, it would be much more plausible. But each word has to be considered on its own, without preconceptions. As we will show in the next section, *personal* has to be grouped with *actual*, *consensual*, and *crucial*, not with *governmental*, *developmental*, and *accidental*.

B. The meaning of *personal* in Exemption 7(C) is unaffected by the statutory definition of *person* because *personal* is used only with reference to human beings.

1. Dictionaries consistently define **personal** *in terms supporting the government's interpretation.*

Although AT&T relies on dictionary definitions of *personal*, such definitions support the government's interpretation, not AT&T's.

Let us start with one of the definitions AT&T relies on: "of or relating to a particular person."[17] This is the first definition in *Webster's Third New International Dictionary*. Or rather, it is *part* of the first definition. This is the full definition:

> of or relating to a particular person : affecting one individual or each of many individuals : peculiar or proper to private concerns : not public or general <~ allegiance> <~ baggage> <~ correspondence>

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[17] *Webster's Third* at 1686, *quoted in* AT&T Br. in Opp. to Cert. Pet. 22.

The corresponding definition in the previous edition of this dictionary, which AT&T also selectively quotes from, is substantially identical.[18]

AT&T's argument is undermined by the portions of these definitions that it does not quote. The definition's second clause says, "affecting one *individual* or each of many *individuals*," which is inconsistent with AT&T's interpretation of the definition (in the context of this case) as "of or relating to a particular [corporate] person." The next clause reads, "peculiar or proper to private concerns," which suggests a specialized meaning that does not derive directly from the meaning of *person*. Finally, the definition's examples ("personal allegiance," "personal baggage," and "personal correspondence") are phrases that are primarily if not exclusively applicable to human beings.

Other definitions—in the dictionaries AT&T cites and in others—similarly refute the suggestion that *personal* is merely "the adjectival form of 'person.'" In Appendix A to this brief, we have set out the definitions of *personal* from 14 dictionaries, ranging from the scholarly and comprehensive *Oxford English Dictionary* to general-purpose dictionaries to dictionaries intended for advanced learners of English as a foreign language.[19]

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[18] *Webster's New International Dictionary of the English Language* 1828 (2d ed. unabridged 1953) ("*Webster's 2d*").

[19] The dictionaries are (in addition to those cited above) the *Oxford English Dictionary Online* (2010 draft revision) ("*OED*"), *Funk & Wagnalls New Standard Dictionary of the English Language* (1962)("*Funk & Wagnalls*"), the *Random House Dictionary of the English Language* (Unabridged ed. 1967) ("*Random House*"), *Merriam-Webster's Collegiate Dictionary* (7th ed. 1972) ("*M-W Collegiate*"), the *American Heritage Dictionary of the English Language* (1980) ("*American Heritage*"),

These dictionaries all define *personal* in terms showing (a) that it has a specialized meaning (or rather, a set of specialized meanings), and (b) that given those meanings, one would expect the word to be used in regard to human beings and not corporations:

- "of and concerning one's private life, relationships, and emotions rather than matters connected with one's public or professional career"[20] (or a similar definition) as in *personal life*, *personal relationship*, and *I have something personal to tell you*;[21]
- "of, affecting, or belonging to a particular person rather than to anyone else"[22] (or a similar definition), as in *personal taste*, *personal responsibility*, *personal fortune*, *personal belongings*, *personal opinion*, *personal assistant*, *personal tragedy*, and *personal preference*;[23]

Webster's New Universal Unabridged Dictionary (2d ed. 1983) ("*Webster's Universal*"), the *New Oxford American Dictionary* (2d ed. 2005) ("*NOAD*"), the *Encarta Webster's Dictionary of the English Language* (2d U.S. ed. 2004)("*Encarta*"), the *Collins English Dictionary* (10th ed. 2009)("*Collins*"), the *Oxford Advanced Learner's Dictionary* (7th ed. 2005) ("*OALD*"), the *Macmillan Dictionary* (2007) ("*Macmillan*"), and the *Longman Dictionary of Contemporary English* (5th ed. 2009) ("*Longman*").

[20] *NOAD*, sense 2.

[21] *OED*, sense 1a; *American Heritage*, sense 3; *Encarta*, sense 1; *Collins*, senses 1, 5; *OALD*, senses 1, 2; *Macmillan*, senses 1a, 2; *Longman*, sense 2. *Cf.* *Webster's Universal*, senses 1, 5.

[22] *NOAD*, sense 1.

[23] *OED*, sense 1b, 4f; *Random House*, sense 3; *Encarta*, sense 4; *OALD*, sense 1; *Collins*, sense 3; *Macmillan*, sense 1; *Longman*, sense 1.

- "relating to the person or body"[24] (or a similar definition), as in *personal hygiene* and *personal injury*;[25]
- "done, made, or performed in person" (or a similar definition), as in *a personal interview*, *personal attention*, and *make a personal appearance*;[26] and
- "referring to a particular person's character, appearance, opinions, etc. in a way that is offensive"[27] (or a similar definition), as in *there's no need to get personal* and *an uncalled-for, highly personal remark*.[28]

Several dictionaries give additional definitions that reinforce our point:

- "having oneself as an object; directed towards oneself," as in *personal vanity* and *personal awareness*;[29]
- "of or arising from the personality," as in *personal magnetism*;[30] and

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[24] *Webster's 3rd*, sense 3.

[25] *E.g.*, *OED*, sense 3; *Funk & Wagnalls*, sense 5; *M-W Collegiate*, sense 5; *American Heritage*, sense 5; *Webster's Universal*, sense 3; *Random House*, sense 9; *NOAD*, sense 3; *Encarta*, sense 7; *Collins*, sense 2; *OALD*, sense 7; *Longman*, sense 6.

[26] *E.g.*, *OED*, sense 2a; *Funk & Wagnalls*, sense 3; *American Heritage*, sense 2; *Webster's Universal*, sense 4; *Random House*, sense 6; *NOAD*, sense 1; *Collins*, sense 4; *OALD*, sense 4; *Macmillan*, sense 5.

[27] *OALD*, sense 6.

[28] *OED*, sense 4a, 4b; *Funk & Wagnalls*, sense 6; *American Heritage*, sense 4; *Webster's Universal*, sense 5; *Random House*, senses 4, 5; *NOAD*, sense 2; *Encarta*, senses 5, 6; *Collins*, sense 5; *Macmillan*, sense 3; *Longman*, sense 3.

[29] *OED*, sense 4c.

- “belonging to human beings, not to things or abstractions.”[31]

These definitions describe ways of using the word *personal* that make sense only with respect to *people*, not artificial entities that are deemed juridical *persons*. And note that the sense of *personal* that is primarily triggered by the phrase *personal privacy* is the first one in our list: “of and concerning one’s private life, relationships, and emotions rather than matters connected with one’s public or professional career[.]”[32] Also relevant to some extent is the second sense on the list: “belonging to, associated with, or intended for a particular person.”[33] While that definition might seem at first to leave open the possibility of using this sense of *personal* with respect to a corporation, the examples that exemplify this sense of *personal* (e.g., *personal responsibility*, *personal fortune*, *personal belongings*, *personal opinion*, *personal assistant*) pertain only to human beings.

2. *The meaning of* personal *is shown by the contexts in which it is ordinarily used, which concern people, not corporations.*

a. The conclusion suggested by the definitions we have discussed is confirmed by how *personal* is actually used in ordinary language.

To prove that point, we will rely on evidence of the kind that lexicographers have increasingly come to rely on: the analysis of electronic text collections called “cor-

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30. *Collins*, sense 7.

[31] *Webster’s Universal*, sense 1.

[32] *NOAD*, sense 2.

[33] *Id.*, sense 1.

pora" (the plural of "corpus").[34] A corpus is like Lexis on steroids. It is a database of texts gathered from a variety of real-world sources (books, newspapers, magazines, transcripts of spoken language) that has been processed in ways that enable one to search for and analyze patterns in the language. So if one wants to find out, say, which nouns are most commonly modified by *personal*, it is possible to generate a list of those words, ranked by frequency. This provides powerful evidence of what meanings the word can have; as this Court has noted, "the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used."[35] Lexicographers follow much the same principle.[36]

Dictionaries have relied on evidence of actual usage starting at least as far back as Samuel Johnson, who included illustrative quotations drawn from literary sources.[37] The *Oxford English Dictionary* is famously based on evidence in the form of millions of quotations submitted by a small army of readers.[38] And dictionaries since then have relied heavily on examples of actual usage.[39]

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[34] *See, e.g.*, Henri Béjoint, *The Lexicography of English* 348–57, 368–70 (2010); *Dictionaries: The Art & Craft of Lexicography*, *supra* note 16, at 192–93, 273–342.

[35] *Deal v. United States*, 508 U.S. 129, 132 (1993).

[36] *See, e.g.*, *Dictionaries: The Art & Craft of Lexicography*, *supra* note 16, at 297–304.

[37] *The Lexicography of English*, *supra* note 34, at 77.

[38] *See, e.g.*, *The Lexicography of English*, *supra* note 34, at 96–99; *Lexicography: An Introduction*, *supra* note 8, at 166–67.

[39] *See, e.g.*, *Random House Webster's Unabridged Dictionary* ix (2d ed. 1987/1997)("Dictionary editors are objective reporters

Moreover, this Court has itself looked to such evidence. In *District of Columbia v. Heller*, the Court considered examples of actual usage from the period before and shortly after the adoption of the Second Amendment.[40] And in *Muscarello v. United States*, the Court "surveyed modern press usage...by searching computerized newspaper data bases" to find out if there were instances in which the verb *carry* was used to describe the act of transporting a firearm in a car.[41] Thus, there is nothing new about examining how a word is used in real life in order to determine what the word means.

What *is* new about the use of corpora is that it has made it possible to quickly review and analyze huge quantities of text, which has enabled lexicographers to see patterns of usage that would otherwise have gone unnoticed. This is widely regarded as having revolutionized the writing of dictionaries.[42] Until recently, the use of corpora was limited to lexicographers, linguists, and other researchers. But these sophisticated tools are now available to anyone with internet access.

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on the language, stating the observed facts of usage."); *Webster's Third* at 4a ("In accordance with the principle that a definition, to be adequate, must be written only after an analysis of usage, the definitions in this edition are based chiefly on examples of usage collected since the publication of the preceding edition."); *Dictionaries: The Art & Craft of Lexicography*, *supra* note 16, at 189–207; *Lexicography: An Introduction*, *supra* note 8, at 28–29, 166–67.

40. 128 S. Ct. 2783, 2791–97 (2008).

41. 524 U.S. at 129.

42. *See, e.g.*, *The Lexicography of English*, *supra* note 34, at 368–69; *Lexicography: An Introduction*, *supra* note 8, at 169.

Beginning in 2007, three large corpora were made available for public use online: the TIME Corpus of American English, a 100 million word corpus of texts taken from *Time* magazine, covering the period 1923 through the 2000s;[43] the Corpus of Contemporary American English ("COCA"), a 410+ million word corpus containing 20 million words from each year beginning in 1990;[44] and most recently the Corpus of Historical American English ("COHA"), a 400 million word corpus containing 20 million words from each decade from the 1810s through the 2000s.[45] These corpora are the tools we will use to look at how the word *personal* is used in real life.

b. Our method will be to find out what nouns *personal* most often modifies, and we will do this by querying each corpus so that it returns the nouns that appear most frequently in the position immediately following *personal*. As the Court will see, the results decisively support the conclusion that *personal* has developed a specialized meaning such that it is used with regard to human beings, not corporations.[46]

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[43] Mark Davies, *TIME Magazine Corpus (100 million words, 1920s-2000s)*, http://corpus.byu.edu/time (2007-).

[44] Mark Davies, *The Corpus of Contemporary American English: 410+ million words, 1990–present*, http://www.americancorpus.org (2008–).

[45] Mark Davies, *The Corpus of Historical American English 400+ million words, 1810–2009*, http://corpus.byu.edu/coha (2010–).

[46] All corpus results discussed in this brief can be viewed online via the URL provided in the footnote for each set of results. In the PDF version of this brief, those URLs are clickable links.

Since the "invasion of personal privacy" language in Exemption 7(C) was enacted in 1974,[47] we will begin by using COHA and the TIME Corpus to look at usage during the 1970s. The following are the pairings in each corpus that occurred at least ten times, listed in order of their frequency:[48]

COHA: personal life, personal income, personal property, personal interest, personal experience, personal relationship, personal problem, personal reason, personal injury, personal thing, personal appearance, personal contact, personal matter, personal friend, personal power, personal opinion, personal fortune, personal gain, personal history, personal letter, personal use, personal view, personal question, personal tragedy, personal physician, personal attack, personal affair, personal freedom, personal feeling, personal loan, personal knowledge, personal style, personal responsibility, personal secretary, personal quality, personal involvement, personal choice, personal appeal, personal account, personal finance, personal liberty, personal nature, personal preference, personal level, personal integrity, personal feel, personal communication, personal staff.[49]

TIME (not including overlap with COHA): personal triumph, personal message, personal interview,

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[47] Pub. L. No. 93-502, § 2(b) (Nov. 21, 1974), *codified at* 5 U.S.C. § 552(b)(7).

[48] Some of the listings include plural forms of the noun as well as singular.

[49] COHA, http://corpus.byu.edu/coha/?c=coha&q=6871911 (sample size: 23,769,305 words).

> personal ambition, personal aide, personal popularity, personal prestige, personal paper, personal attorney, personal relations, personal tax, personal touch, personal statement, personal decision.[50]

Except for *personal property*, which can be used as a legal term of art, each of these phrases can be used only with regard to human beings. For example, corporations don't have personal lives and don't receive personal income. They have no personal interests or personal feelings and are unable to have personal experiences, personal relationships, or personal preferences. These results are evidence that the meaning of *personal* is independent of (although certainly related to) that of *person*, and that *personal* has a strong semantic association with concepts that are applicable to humans but not corporations.

The evidence becomes even stronger when the same query is run on a larger sample size. We have run the same query on COHA and the TIME Corpus for longer time periods: the 1950s–1970s for both corpora, the 1900s–1970s for COHA, and 1923–1970s for the Time Corpus. We have also run it on COCA, which contains more than 410 million words. In each instance, the pattern is the same as in the results given above: *personal* appears almost exclusively in phrases that can be used regarding humans but not corporations.

Set out below are the fifteen most frequent phrases from each of these expanded searches; the 100 most frequent are set out in Appendices B–F, and the 200 most frequent can be viewed online via the URLs provided in the footnotes.

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[50] TIME Corpus, http://corpus.byu.edu/time/?c=time&q=6872290 (sample size: approx. 12.4 million words).

COHA (1950s–1970s): personal income, personal experience, personal life, personal friend, personal interest, personal property, personal relationship, personal identity, personal appearance, personal problem, personal matter, personal reason, personal contact, personal opinion, personal physician.[51]

COHA (1900s–1970s): personal friend, personal experience, personal interest, personal property, personal appearance, personal income, personal service, personal life, personal contact, personal matter, personal liberty, personal relationship, personal relation, personal affair, personal opinion.[52]

TIME (1950s–1970s): personal income, personal life, personal friend, personal fortune, personal experience, personal letter, personal attack, personal triumph, personal secretary, personal history, personal physician, personal popularity, personal problem, personal reason, personal relationship.[53]

TIME (1923–1970s): personal income, personal friend, personal life, personal physician, personal fortune, personal property, personal history, personal representative, personal triumph, personal experience, personal letter, personal secretary, personal popularity, personal attack, personal reason.[54]

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[51] COHA, http://corpus.byu.edu/coha/?c=coha&q=7079945 (sample size approximately 72 million words); *see* Appx. B.

[52] COHA, http://corpus.byu.edu/coha/?c=coha&q=7080046 (sample size approx. 191.5 million words); *see* Appx. C.

[53] TIME Corpus, http://corpus.byu.edu/time/?c=time&q=7121810 (sample size approx. 43.9 million words); *see* Appx. D.

COCA: personal life, personal computer, personal experience, personal relationship, personal responsibility, personal information, personal trainer, personal communication, personal use, personal finance, personal history, personal income, personal interest, personal level, personal problem.[55]

Note that although COCA covers a period beginning more than 15 years after the language at issue here was enacted, the results from COCA are consistent with those from COHA and the TIME Corpus, albeit with a somewhat different mix of words. This suggests that the aspect of meaning that is at issue here has remained stable over time and that *personal* means the same thing now as it did when the language at issue was enacted.

3. The conclusion that the phrase **personal privacy** *does not encompass corporate "privacy" is supported by the behavior of the word* **privacy.**

The government and Comptel have argued that privacy (as opposed to, say, secrecy and confidentiality) is a concept associated with human beings, not corporations.[56]

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[54] TIME Corpus, http://corpus.byu.edu/time/?c=time&q=7122625 (sample size approx. 78.2 million words); *see* Appx. E.

[55] http://corpus.byu.edu/coca/?c=coca&q=7123549 (sample size 410+ million words); *see* Appx. F.

[56] Gov't Br. 18–19; Comptel Br. 9.

That conclusion is supported by the linguistic behavior of the word *privacy*.

In order to determine the extent to which the word is associated with humans, we performed several types of corpus searches. First, we determined which adjectives were used most often to modify *privacy*. In each search, *personal* was in the top three, and the only adjectives that appeared more frequently were adjectives of quantity or degree (*little*, *absolute*, and *strict*).[57] *Individual privacy* appeared in COHA as number 6, in the TIME corpus as number 2, and in COCA as number 3. Other phrases appearing with disproportionate frequency included *medical privacy*, *online privacy*, and *patient privacy*, all of which are strongly associated with human beings.

In another set of searches, we examined the use of possessive pronouns with *privacy* (*my privacy*, *his privacy*, *its privacy*, etc.). We did this because the personal pronoun used in a particular instance can be a good indicator of whether the entity to which possession is being ascribed is human: one would expect *my* to be used only with reference to humans (or to fictional creatures such as talking animals), *his* and *her* to be used only with reference to humans or animals, *your* and *our* to be used mostly but not entirely with reference to humans, *their* to be used with reference to any type of entity, and *its* to be used with reference to entities other than humans.

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[57] *See* COHA, http://corpus.byu.edu/coha/?c=coha&q=7173997 (1930s–1980s); TIME Corpus, http://corpus.byu.edu/time/?c=time&q=7173948 (1930s–1980s); COCA, http://corpus.byu.edu/coca/?c=coca&q=7174149.

Our corpus results showed that with few exceptions, *privacy* was used with reference to human beings. Looking first at the numbers (which are summarized in the table below), there was a high proportion of pronouns that would be expected to be used almost exclusively in reference to humans (*my*, *his*, *her*) or used mostly with reference to humans (*your*, *our*). In addition, only a small proportion of the pronouns would be expected to be used in reference to entities other than humans (*its*).

COHA[58] 1930s–80s		TIME[59] 1930s–80s		COCA[60]	
his	70	his	43	their	351
their	50	their	26	your	199
her	38	her	18	his	189
your	26	our	3	her	176
our	14	my	3	my	132
my	13	your	2	our	123
its	9	its	1	its	33

But these figures substantially understate the extent to which *privacy* was used in reference to humans. Reviewing the individual results shows that except for uses of the phrase *its privacy*, the pronoun almost invariably refers to a human or group of humans. And most of the seeming exceptions involved the use of *privacy* in reference to humans indirectly—for example, the use of *its privacy* in reference to the privacy afforded to humans by a particular place ("he chose this part of the lake to swim in for its privacy"[61]). Only two results (out of a total of 1,423) involved a reference to privacy as something possessed by a corporation or similar entity.[62]

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[58] http://corpus.byu.edu/coha/?c=coha&q=7214133.

[59] http:/corpus.byu.edu/time/?c=time&q=7217553

[60] http://corpus.byu.edu/coca/?c=coca&q=7214098.

This pattern is also repeated elsewhere. In the corpora we have been discussing, the phrase *personal privacy* occurs much more frequently than *corporate privacy*, even after adjusting for the difference in frequency between *personal* and *corporate*:[63]

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[61] *Id.* (click on *its* in top right-hand frame, then go to no. 12). *See also id.* nos. 8, 11, 26, 31. In many of the instances in which *its privacy* appears, it forms part of a larger noun phrase such as *its privacy policy* or *its privacy implications* and therefore is not relevant here. *E.g.*, *id.* nos. 1–6, 10, 14–23, 28.

[62] *Id.* nos. 32, 33.

[63] http://corpus.byu.edu/coha/?c=coha&q=7252911 (COHA: *personal privacy*); http://corpus.byu.edu/coha/?c=coha&q=7252897 (COHA: *corporate privacy*); http://corpus.byu.edu/time/?c=time&q=7252847 (TIME: *personal privacy*); http://corpus.byu.edu/time/?c=time&q=7252859 (TIME: *corporate privacy*); http://corpus.byu.edu/coca/?c=coca&q=7252828 (COCA: *personal privacy*); http://corpus.byu.edu/coca/?c=coca&q=7252785 (COCA: *corporate privacy*).

The frequency counts on which the adjustments are based are as follows:

	personal	*corporate*
COHA	17,999	3,600
TIME	16,361	6,336
COCA	71,314	24,335

http://corpus.byu.edu/coha/?c=coha&q=7252434 (COHA: *personal*); http://corpus.byu.edu/coha/?c=coha&q=7252405 (COHA: *corporate*); http://corpus.byu.edu/time/?c=time&q=7252455 (TIME: *personal*); http://corpus.byu.edu/time/?c=time&q=7252472 (TIME: *corporate*); http://corpus.byu.edu/coca/?c=coca&q=7252506 (COCA: *personal*); http://corpus.byu.edu/coca/?c=coca&q=7252506 (COCA: corporate).

	COHA 1930s–80s	TIME 1930s–80s	COCA
personal privacy	14	10	87
personal privacy (adjusted)	2.8	3.9	29.7
corporate privacy	0	0	1

The pattern can also be seen in Google search results. *Personal privacy* (in quotation marks) gets 3.9 million hits, while *corporate privacy* (in quotation marks) gets only 932,000.[64] Moreover, the latter result is misleadingly high. Many of the hits represent news stories about this case, and in many others *corporate privacy* appears as part of a phrase such as *corporate privacy policy*, *corporate privacy guidelines*, and *corporate privacy abuses*. If the search is modified to filter out this irrelevant data, the count is reduced by more than 95%.[65] And even then, many of the results are still irrelevant, such as *corporate privacy principles*, *corporate privacy battle*, and *corporate privacy breaches*).[66]

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[64] *Compare* http://tinyurl.com/2w6haxa (*personal privacy*) *with* http://tinyurl.com/34kntl9 (*corporate privacy*).

[65] The following search (without the angle brackets) returned about 10,900 hits: <"corporate privacy" -"corporate privacy statement" -"corporate privacy policy" -"corporate privacy case" -"corporate privacy rights" -"high court" -"supreme court">. http://tinyurl.com/2vchcwy.

[66] The fact that one can find uses of *corporate privacy* does not affect any of our conclusions here. *Corporate privacy* obviously means something different from *personal privacy*, and there is no reason to think that the mere existence of the former phrase has an impact on the meaning of the latter. Nor does the sporadic use of *corporate privacy* eliminate the strong semantic association of the word *privacy* with human beings. Used by itself, *privacy* is likely to be understood as pertaining to human

Significantly, *privacy* behaves differently than the words *confidentiality* and *secrecy*, in that the latter are much more amenable to being combined with *corporate* than is *privacy*. *Corporate confidentiality* gets about 15,500 Google hits, while *personal confidentiality* gets only 11,100.[67] Similarly, *corporate secrecy* beats *personal secrecy* 34,600 to 7,860, a ratio of more than 4:1.[68] These results are significant because secrecy and confidentiality are interests that are protected by FOIA Exemption 4, which covers "trade secrets and commercial or financial information obtained from a person and privileged or confidential[.]"[69] The results are therefore consistent with the conclusion that protection of non-

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beings. When it is modified by *personal*, that understanding is reinforced and any inconsistent understanding is ruled out. But when it is modified by *corporate*, it is in effect coerced into meaning something else.

The use by some people of the phrase *corporate privacy* also does not affect the conclusion that the only privacy interests protected by the law are personal privacy interests. *See* Gov't Br. 18–20; Comptel Br. 9–10. The scope of legal protection of privacy need not be, and is not, coextensive with the ordinary meaning of the word *privacy*. For example, there is liability for intruding upon someone's seclusion or publicizing private aspects of his life only if the conduct at issue is "highly offensive to a reasonable person[.]" Restatement (2d) of Torts §§ 652B, 652D. Thus, the law does not provide a remedy for everything that could be regarded as an invasion of privacy under the ordinary meaning of that phrase.

[67] *Compare* http://tinyurl.com/364vj86 (*corporate confidentiality*) against http://tinyurl.com/2whac4w (*personal confidentiality*).

[68] *Compare* http://tinyurl.com/33r9w3x (*corporate secrecy*) *against* http://tinyurl.com/366av7e (*personal secrecy*).

[69] 5 U.S.C. § 552(b)(4).

public corporate information from disclosure under FOIA is governed by Exemption 4, not Exemption 7.

C. As used in Exemption 7(C), the word *personal* and the phrase *personal privacy* retain their ordinary meanings, and therefore are not amenable to being used in reference to corporations.

We have focused so far on the ordinary meaning of the word *personal* in nonlegal contexts. But the fact that this case involves a legal context does not affect the analysis of what *personal privacy* means as it is used in Exemption 7(C).

To begin with, neither *personal* nor *personal privacy*. is a legal term of art. Although the most recent edition of *Black's Law Dictionary* lists many phrases beginning with the word *personal* (including such ordinary terms as *personal check*, *personal effects*, *personal history*, *personal name*, *personal reputation*, *personal knowledge*, and *personal security*) it has no entry for *personal privacy* and does not define *personal* in terms that are out of the ordinary.[70] An earlier edition (published six years before the "personal privacy" language in Exemption 7(C) was enacted) similarly has no entry for *personal privacy* and similarly defines *personal* consistently with its ordinary meaning: "Appertaining to the person; belonging to an individual; limited to the person; having the nature of partaking of the qualities of human beings, or of movable property."[71]

Furthermore, as shown below, both *personal* and *personal privacy* are often used in legal contexts in their ordinary senses.

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[70] *Black's Law Dictionary* (9th ed. 2009).

[71] *Black's Law Dictionary* 1300 (rev. 4th ed. 1968).

1. *Courts have consistently used the word* **personal** *and the phrase* **personal privacy** *in accord with their ordinary meanings.*

In a variety of contexts, courts have used the word *personal* and the phrase *personal privacy* in ways incompatible with the suggestion that the phrase can be understood in the context of this case as *corporate privacy*. In fact, the use of *personal privacy* by this Court, along with other courts, reflects an understanding that personal privacy is by definition not something that can be possessed by a corporation.

a. We begin with the latter point. This Court said in 1941 that "[t]he constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals" and that it therefore "cannot be utilized by or on behalf of any organization, such as a corporation." It went on to say that individuals acting on behalf of a corporation "cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges[,]" and that corporate records "embody no element of personal privacy[.]"[72] Similarly, the Court said in 1968 that a search of corporate offices "involve[s] absolutely no invasion of the 'personal privacy' or security of the agent or employee as an individual[.]"[73]

Similar statements have been made by other courts, such as this statement by the Georgia Supreme Court in a case where the regents of a public university were resisting a request for disclosure of certain records: "In this appeal, there is no claim on behalf of any individual of an invasion of personal privacy. It is not a *personal* right to privacy that is urged upon us, but rather a *corporate* preference for privacy...."[74]

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[72] *United States v. White*, 322 U.S. 694, 698-700 (1944).

[73] *Mancusi v. DeForte*, 392 U.S. 364, 374 (1968).

b. In other areas, courts have similarly used the phrase *personal privacy* in contexts in which the phrase could only be understood as referring to human beings.

For example, the phrase has been used to describe the interest that is invaded by a strip search[75] or by surveillance of the interiors of stalls in a public restroom.[76] It has been used in conjunction with references to the home, such as in these statements:

> "No violation of personal privacy such as that existing in the home is involved [here]."[77]
>
> "[T]he distinction [between contraband and other property] is not sufficient to sanction an invasion of the right to personal privacy in the home...."[78]
>
> "The object of the inquiry is to enforce a familial monetary obligation, not to interfere with personal privacy. There is no intrusion into the

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[74] *Board of Regents of the University System of Georgia v. Atlanta Journal*, 378 S.E.2d 305, 308 (Ga. 1989) (emphasis in the original).

[75] *Safford Unified School Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2641 (2009); *Morales v. United States*, 406 F.2d 1298, 1300 (9th Cir. 1969).

[76] *Britt v. Superior Court of Santa Clara County*, 374 P.2d 817, 819 (Cal. 1962).

[77] *West Virginia v. Melanakis*, 40 S.E.2d 314, 318 (W. Va. 1946).

[78] *Work v. United States*, 243 F.2d 660, 664 (D.C. Cir. 1957) (Burger, J., dissenting).

> home nor any participation in interpersonal decisions among its occupants...."[79]

Courts have also referred to personal privacy as something that belongs to individuals:

> "The subject of an individual's interest in and right to personal privacy has, in the last decade, become a matter of a somewhat extensive discussion by legal commentators."[80]
>
> "The right of privacy is defined as a personal right protecting the individual's 'right to be let alone.' Generally speaking, it is a wrongful invasion of that personal privacy which a person has as a part of his private life."[81]

Finally, at least one court has distinguished between personal privacy and the privacy that a public official is entitled to in the performance of his duties:

> "Eavesdropping upon a cabinet meeting discussion or an executive session of an appellate court would be an invasion of that privacy..., but if there would be a right to such privacy it would be a right of official privacy which would be invaded, not personal privacy...."[82]

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[79] *Doe v. Norton*, 365 F. Supp. 65, 77 (D. Conn. 1973), *vacated sub nom. Roe v. Norton*, 422 U.S. 391 (1975).

[80] *Opinion of the Justices*, 250 N.E.2d 448, 449 (Mass. 1969).

[81] *Billings v. Atkinson*, 471 S.W.2d 908, 912 (Tex. Civ. App. 1971), *rev'd*, 489 S.W.2d 858 (Tex. 1973).

[82] *Hull v. Curtis Publishing Co.*, 125 A.2d 644, 651 (Pa. Super. Ct. 1956).

2. *Congress has repeatedly used the word* **personal** *in accord with its ordinary meaning.*

Over and over again, Congress has used the word *personal* in a way that is consistent with the pattern of usage that is shown by the corpus evidence. We determined this by performing a Lexis search for all uses of *personal* in the United States Code as in effect in 1992, which was the earliest year for which Lexis provided a searchable version of the Code.[83] A total of 1,675 documents containing the word *personal* were found, and while in many instances the word was used as part of a legal term of art, there were also many in which it was used in its everyday sense.

In virtually all of the latter cases, one sees the same pattern as is seen in COHA, the TIME corpus, and COCA: *personal* was used as part of a phrase that can be used with respect to human beings but not corporations. Here are the first twenty entries in an alphabetical list of the phrases we found; the entire list is set out in Appendix G:[84]

> personal account, personal action, personal adjustment counseling, personal advantage, personal aim, personal appearance, personal assets, personal assistance, personal assistant, personal baggage, personal benefit, personal bias, personal capacity, personal care, personal care services, personal characteristics, personal checks, personal choice, personal circumstances, personal civil legal

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[83] The search was performed in the file US1992 in the United States Code Service Materials (Archived) library.

[84] The list in Appendix G was compiled by examining about half of the 1,675 Lexis search results, so it may not include every relevant phrase in the United States Code.

affairs, personal communications system, personal conflict of interest, personal consequences, personal consultation, personal consumption.

3. *Commentators have used the phrase* personal privacy *to refer to a concept distinct from corporate confidentiality.*

It is not uncommon to see a reference to personal privacy as something distinct from corporate confidentiality or corporate privacy, as is shown by these quotes from law-review articles and other legal commentary:

> "Richard Posner himself, while favoring corporate confidentiality, is generally against legal protection of personal privacy...."[85]

> "In contrast to individual tax returns, there is no offsetting personal privacy interest in maintaining corporate confidentiality."[86]

> "It has been argued that computer technology also poses the risk of a potential invasion of corporate privacy, but such concerns are secondary to that of personal privacy which arguably has constitutional protection domestically, and protection internationally under a number of Human Rights agreements."[87]

* * *

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[85] Margaret Ann Wilkinson, *The Public Interest in Moral Rights Protection*, 2006 Mich. St. L. Rev. 193, 230 n.158 (2006).

[86] Alan B. Morrison, *Balancing Privacy & Accountability: What To Do To Do About Tax Returns*, http://www.citizen.org/litigation/article_redirect.cfm?ID=10162 (June 13, 2003).

[87] Aryeh S. Friedman, *Law And The Innovative Process: Preliminary Reflections*, 1986 Colum. Bus. L. Rev. 1, 27 n.108 (1986).

It is abundantly clear, from both dictionaries and actual usage, that *personal* is not the "adjectival form" of *person* and that the meaning of *personal* is not dependent on or linked to that of *person*. There is no reason to think that the meaning of *personal privacy* in Exemption 7(C) is affected by FOIA's definition of *person* as including corporations.

Conclusion

The Third Circuit's decision should be reversed.

Respectfully submitted,

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November 16, 2010

Appendix A
Definitions of *personal*

Oxford English Dictionary Online 2a
Webster's New International Dictionary (2d ed. unabridged 1953) 4a
Merriam-Webster's Third New International Dictionary (1961/1993) 5a
Funk & Wagnalls New Standard Dictionary of the English Language (1962) 6a
Random House Dictionary of the English Language (Unabridged ed. 1967) 7a
Merriam-Webster's Collegiate Dictionary (7th ed. 1972) 9a
American Heritage Dictionary of the English Language (1980) 10a
Webster's New Universal Unabridged Dictionary (2d ed. 1983) 11a
New Oxford American Dictionary (2d ed. 2005) 12a
Encarta Webster's Dictionary of the English Language (2d U.S. ed. 2004) 13a
Collins English Dictionary (10th ed. 2009) 14a
Oxford Advanced Learner's Dictionary (7th ed. 2005) 15a
Macmillan Dictionary (2007) 17a
Longman Dictionary of Contemporary English (5th ed. 2009) 19a

Oxford English Dictionary Online

(Draft revision 2010)[a]

(Illustrative quotations omitted.)

A. *adj.*

I. General uses.

1. a. Of, relating to, concerning, or affecting a person as a private individual (rather than as a member of a group or the public, or in a public or professional capacity); individual, private; one's own.

b. Designating an official or employee attached to someone in a close or exclusive subordinate capacity, as *personal assistant, personal maid, personal trainer*, etc.

2. a. Done, made, held, performed, etc., in person, or by the person concerned; involving the actual presence or action of the individual (as opposed to an agent or representative). Of a reciprocal action or relationship: conducted between individuals directly.

b. Present or engaged in person. *Obs.*

3. a. Of, relating to, or belonging to one's person, body, or appearance; bodily; physical.

b. Affecting one's body; relating to one's physical safety or well-being.

4. a. Having an individual as object; relating to a person in his or her individual capacity; directed towards, aimed at, or referring to a particular person or to oneself, esp. in a disparaging or offensive sense or manner.

b. Of a person, publication, etc.: that remarks on a person's character, private concerns, etc., esp. in a disparaging or offensive way; characterized by or given to making such remarks.

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[a] http://www.oed.com. *See also* 11 *Oxford English Dictionary* 599–600 (2d ed. 1989).

c. Having oneself as object; directed towards oneself.

d. Of an article, advertisement, notice, etc.: dealing with or relating to the private matters of an individual.

e. Of a letter or other communication: directed to or intended for a particular individual.

f. Of a radio, television, piece of stereo equipment, etc.: designed to be used by a single individual; small and (usually) portable.

5. a. Characteristic of a person or conscious being, as opposed to a thing or abstraction. *Obs.*

b. Having the nature or attributes of a person; existing as an entity with self-awareness, not as an abstraction or an impersonal force.

6. ***personal to***.

a. Directed towards or referring to (a particular individual or group of people). Now *rare*.

b. Belonging exclusively or specially to; having particular significance, importance, or meaning for.

II. Technical uses.

[Omitted.]

III. Other uses.

10. Attractive, handsome; presentable; = PERSONABLE *adj.* 1a. *Obs. rare*.

Webster's New International Dictionary
(2d ed. unabridged 1953)

1. Of or relating to a particular person; affecting one individual or each of many individuals; peculiar or proper to private concerns; not public or general; as, *personal* allegiance, comfort, desire, baggage.

2 a : Done in person without the intervention of another : direct from one person to another; as, a *personal* inquiry; *also Obs* **:** engaged or present in person **b** carried on between individuals directly.

3 Pertaining to the person, or body; bodily; as, *personal* charms, appearance, ornaments, liberty.

4 a : Relating to an individual, his character, conduct, motives, or private affairs esp. in an invidious or offensive manner; as, *personal* reflections or remarks; also, relating to oneself, as *personal* vanity. **b** Making or given to making personal reflection.

5 a Relating to or characteristic of human beings as distinct from things. [Example quotation omitted.] **b** Rational and self-conscious; as, a *personal* God.

6 Exclusively for a given individual; as, a personal letter.

. . .

[Page 1828]

Merriam-Webster's Third New International Dictionary
(1961/1993)

1 : of or relating to a particular person : affecting one individual or each of many individuals : peculiar or proper to private concerns : not public or general <~ allegiance> <~ baggage> <~ correspondence>

2 a : done in person without the intervention of another : direct from one person to another <a ~ inquiry>; *also* : originating in or proceeding from a single person <a ~ ultimatum> <~ government> **b** *obs* **:** engaged or present in person **c :** carried on between individuals directly <a ~ interview>

3 : relating to the person or body : bodily <~ appearance> <~ liberty>

4 a : relating to an individual, his character, conduct, motives, or private affairs esp. in an invidious or offensive manner <~ reflections>; also : relating to oneself <~ vanity> **b :** making or given to making personal reflection <very ~ in his comments>

5 a : relating to or characteristic of human beings as distinct from things **b :** rational and self-conscious <a ~ God>

6 : exclusively for a given individual <a ~ letter>

...

[Page 1686.]

Funk & Wagnalls
New Standard Dictionary
of the English Language
(1962)

1. Pertaining to or characteristic of a particular person; not general or public; as, *personal* regard for a man; a purely *personal* matter.

2. Belonging or relating to or constituting a person or persons, as distinguished from things; characteristic of human beings or free agents.

3. Performed by or done to the person directly concerned; transacted or existing between principals and not through agents; done in person; as, *personal* service; *personal* obligation. [quotation omitted]

4. Springing from or belonging to oneself; affecting or relating to one individually; as, *personal* memoirs; a *personal* statement; *personal* habits.

5. Of or pertaining to the body or appearance; as, *personal* beauty.

6. Directly characterizing an individual; hence, reflecting on one's character or conduct; disparaging.

7. *Law.* [Omitted.]

8. *Gram.* [Omitted.]

9.† Present in person.

[Page 1844.]

Random House Dictionary of the English Language

(Unabridged ed. 1967)

1. of, pertaining to, or coming as from a particular person; individual; private: *a merely personal opinion, based on guesswork.*

2. relating to, directed to, or intended for a particular person: *a personal favor; one's personal life; a letter marked "Personal."*

3. intended for use by one person: *a personal car.*

4. referring or directed to a particular person in a disparaging or offensive sense or manner: *personal remarks.*

5. making personal remarks or attacks: *to become personal in a dispute.*

6. done, carried out, held, etc., in person: *a personal conference.*

7. pertaining to or characteristic of a person or self-conscious being: *That is my personal belief.*

8. of the nature of an individual rational being.

9. pertaining to one's person, or bodily aspect: *personal cleanliness.*

10. *Gram.* **a.** noting person: *In Latin* portō *"I carry," -ō is a personal ending.* **b.** of, pertaining to, or characteristic of the personal pronoun.

11. of or pertaining to personal property: *personal interests.*

12. *U.S. Journalism.* **a.** a short news paragraph in a newspaper concerning a particular person, as one who is socially prominent, or a group of particular persons who are socially prominent. **b.** a brief, private notice in a

newspaper or magazine, often addressed to a particular person and typically bearing an abbreviated salutation and signature to preserve its confidentiality, usually printed in a special part of the classified advertising section.

[Page 1075.]

Merriam-Webster's Collegiate Dictionary
(7th ed. 1972)

1 : of, relating to, or affecting a particular person : PRIVATE

2 a : done in person without the intervention of another; *also* **:** proceeding from a single person **b :** carried on between individuals directly

3 : relating to the person or body

4 : relating to an individual or his character, conduct, motives, or private affairs often in an offensive manner

5 *a* : rational and self-conscious

6 : of, relating to, or constituting personal property

7 : denoting grammatical person

[Page 630.]

American Heritage Dictionary of the English Language

(1980)

1. Of or relating to a particular person; private; one's own: *personal affairs*.

2. **a.** Done, made, or performed in person: *a personal appearance*. **b.** Done to or for or directed toward a particular person: *a personal favor*.

3. Concerning a particular person and his or her private business, interests, or activities; intimate: *I have something personal to tell you*.

4. **a.** Aimed pointedly at the most intimate aspects of a person, especially in a critical or hostile manner: *an uncalled-for, highly personal remark*. **b.** Tending to make remarks, or be unduly questioning, about another's affairs: *He always becomes personal in an argument*.

5. Of or relating to the body or physical being: *personal cleanliness*.

6. Relating to or having the nature of a person or self-conscious being: *belief in a personal God*.

7. Law. Relating to a person's movable property: *personal effects*. Compare **real.**

8. Grammar. Indicating grammatical person.

[Page 978.]

Webster's New Universal Unabridged Dictionary
(2d ed. 1983)

1. belonging to human beings, not to things or abstractions.

2. private; individual; affecting individuals; peculiar or proper to a certain person or to private actions or character; as, extreme *personal* annoyance.

3. pertaining to the person, body, or physical appearance; as, *personal* charms or accomplishments

4. done in person or by oneself without the use of another person or outside agency; as, a *personal* interview.

5. having to do with the character, personality, intimate affairs, conduct, etc. of a certain person; as, a *personal* remark.

6. tending to make remarks, or be inquisitive, about the private affairs of others.

7. of, like, or having the nature of a person, or rational self-conscious being; as, a *personal* God

8. in grammar, indicating grammatical person, as the inflectional endings of verbs in Latin and Greek; see also *personal pronoun*

8. in law, of or constituting personal property.

[Page 1338.]

New Oxford American Dictionary
(2d ed. 2005)

1 [*attrib.*] of, affecting, or belonging to a particular person rather than to anyone else: *her personal fortune was recently estimated at $37 million.* ▪ done or made by a particular person; involving the actual presence of action of a particular individual: *the president and his wife made personal appearances for the reelection of the state governor.* ▪ done, intended, or made for a particular person: *a personal loan*

2 of and concerning one's private life, relationships, and emotions rather than matters connected with one's public or professional career: *the book describes his acting career and gives little information about his personal life.* ▪ referring to an individual's character, appearance, or private life esp. in a hostile or critical way: *his personal remarks about Mr. Mellor's work ethic were unprofessional.* | *you look like a drowned rat—nothing personal.*

3 [*attrib.*] of or relating to a person's body: *personal hygiene.*

4 [*attrib.*] *Grammar…*

5 existing as a self-aware entity, not as an abstraction or an impersonal force: *Jews, Christians, and Muslims believe in a personal God.*

[Page 1269.]

Encarta Webster's Dictionary of the English Language

(2d U.S. ed. 2004)

1. **relating to somebody's private life:** relating to the parts of somebody's life that are private ○ *personal relationships*

2. **relating to one person:** relating to a specific person rather than anyone else ○ *my personal opinion*

3. **done by one person only:** done by a specific person rather than by that person's delegate ○ *that personal touch*

4. **intended for somebody:** intended for or owned by a specific person rather than anyone else

5. **referring offensively to somebody:** referring, especially in an offensive way, to somebody's beliefs, actions, or physical characteristics ○ *That personal remark was definitely uncalled-for.*

6. **unfairly remarking or questioning about others:** making unacceptable remarks or being too probing about other people ○ *There's no need to get personal.*

7. **of body:** relating to somebody's body ○ *personal hygiene*

8. RELIG **conscious and individual:** having the character or nature of a conscious and individual entity

9. LAW **of movable property:** relating to or constituting a person's movable property ○ *personal effects*

[Page 1407–08.]

Collins English Dictionary
(10th ed. 2009)[b]

1. of or relating to the private aspects of a person's life: *personal letters ; a personal question*

2. (prenominal) of or relating to a person's body, its care, or its appearance: *personal hygiene; great personal beauty*

3. belonging to or intended for a particular person and no-one else: *as a personal favour; for your personal use*

4. (prenominal) undertaken by an individual himself: *a personal appearance by a celebrity*

5. referring to, concerning, or involving a person's individual personality, intimate affairs, etc, esp in an offensive way: *personal remarks; don't be so personal*

6. having the attributes of an individual conscious being: a personal God

7. of or arising from the personality: *personal magnetism*

8. of, relating to, or denoting grammatical person

9. law Compare real of or relating to movable property, such as money

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[b] http://dictionary.reference.com/browse/personal.

Oxford Advanced Learner's Dictionary
(7th ed. 2005)[c]

YOUR OWN **1** [only before noun] your own; not belonging to or connected with anyone else □ ***personal effects/belongings/possessions*** □ ***personal details*** (= your name, age, etc.) □ *Of course, this is just a personal opinion.* □ *Coogan has run a* ***personal best*** *of just under four minutes.* □ *The novel is written from* ***personal experience.*** □ *Use stencils to add a few* personal touches *to walls and furniture.* □ *All hire cars are for* personal use *only.*

FEELINGS/CHARACTER/RELATIONSHIPS **2** [only before noun] connected with individual people, especially their feelings, characters and relationships □ *Having good* ***personal relationships*** *is the most important thing for me.* □ *He was popular as much for his personal qualities as for his management skills.*

NOT OFFICIAL **3** not connected with a person's job or official position □ *The letter was marked 'Personal'.* □ *I'd like to talk to you about a personal matter.* □ *I try not to let work interfere with my* ***personal life***. □ *She's a personal friend of mine* (=not just somebody I know because of my job). □ *Please keep personal phone calls to a minimum.*

DONE BY PERSON **4** [only before noun] done by a particular person rather than by somebody who is acting for them □ *The President made a personal appearance at the event.* □ *I shall give the matter my personal attention.* □ *She takes a personal interest in the work of the charity.* □ *The Principal has little personal contact with the students.*

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[c] Available at http://www.oxfordadvancedlearnersdictionary.com/dictionary/personal.

DONE FOR PERSON **5** [only before noun] made or done for a particular person rather than for a large group of people or people in general □ *We offer a **personal service** to all our customers.* □ *a **personal pension plan*** (= a pension organized by a private company for one particular person) □ *Will you do it for me as a personal favour?*

OFFENSIVE **6** referring to a particular person's character, appearance, opinions, etc. in a way that is offensive □ *Try to avoid making personal remarks.* □ *There's no need to **get personal**!* □ *Nothing personal* (= I do not wish to offend you), *but I do have to go now.*

CONNECTED WITH BODY **7** [only before noun] connected with a person's body □ ***personal cleanliness/hygiene*** □ *She's always worrying about her personal appearance.* □ *This insurance policy covers you against personal injury or death.*

[Page 1127.]

Macmillan English Dictionary (2007)[d]

1. your own
2. private
3. aimed at one person
4. with direct relationship
5. done by someone themselves
6. +phrases

1. [usually before noun] used about your own opinions or feelings □ *My own personal view is that boxing should be banned.* □ *Choosing a new car is a matter of personal preference.* □ 1a. used about events or experiences in your life □ *her own personal tragedy* □ *Most writers use personal experience as the basis for their novels.* □ 1b. used about things that you own □ *Many of her personal belongings had been stolen.* □ *Every scrap of personal property was removed from his pockets.* □ 1c. used bout services or objects that you do not share with anyone else □ *I've decided to hire a personal trainer.* □ *He has his own personal telephone in his bedroom.*

2. private and not known or available to most people □ *This is a personal matter and does not concern you.* □ *a personal conversation/letter* □ **for personal reasons**: *She quit her job for personal reasons.* □ **personal problems (= ones concerning your relationships or health):** *He's had a few personal problems recently.*

3. aimed at one particular person, in an unfriendly or offensive way □ *He saw her comments as a personal attack.*

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[d] http://www.macmillandictionary.com/dictionary/american/personal.

4. [only before noun] involving a direct relationship between two people who know each other □ *The two leaders had a good personal relationship.* □ *Sue and Harry are close personal friends.* □ **personal chemistry (= strong feelings when two people have a very special close relationship):** the unique personal chemistry between twins

5. done by a person directly, instead of by a representative □ *The Dixie Chicks will be making a personal appearance at the awards ceremony.* □ *the president's personal involvement in the project* □ 5a. used for describing something that is friendly and shows your personality □ *Her visit to my office was a nice personal touch.*

6. [Phrases using *personal* omitted.]

Longman Dictionary of Contemporary English[e]

(5th ed. 2009)

1 [only before noun] belonging or relating to one particular person, rather than to other people or to people in general □ *My personal view is that we shouldn't offer him the job.* □ *Style and colour are a matter of personal taste.* □ *She took full personal responsibility for all the arrangements.* □ *When I went to her room all her personal belongings had gone.* □ *After Alan's death, his mother received his personal effects.* □ *I know from personal experience that you can't trust Ralph.* □ *the personal qualities needed to be successful in business* □ *The car is for personal use only.* □ *On a personal level he felt sympathy for them, but he had a job to do.* □ *celebrities with their own personal trainer*

2 relating to the private areas of your life: □ *I don't answer questions about my personal life.* □ *May I ask you a personal question?* □ *the records will include other personal details such as nationality, date of birth and address* □ *He's got a few personal problems at the moment.* □ *The envelope was marked 'Personal and Confidential'.* □ *We're not allowed to make personal phone calls at work.*

3 involving rude or upsetting criticism of someone: □ *It's unprofessional to make such personal remarks.* □ *a bitter personal attack on the president* □ *There's no need to get personal!* □ *(it's) nothing personal* (=used to tell someone that you are not criticizing them) □ *It's nothing personal, I just have to go home now.*

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[e] http://www.ldoceonline.com/dictionary/personal.

4 if you give something your personal care or attention, you deal with it yourself instead of asking someone else to do it: □ *Small companies can devote more personal attention to each project.* □ *As you get promoted in a firm you lose that personal contact* (=meeting and dealing with people yourself).

5 personal friend someone who you know well, especially a famous or important person □ **personal friend of** □ *Apparently the director is a personal friend of hers.*

6 [only before noun] relating to your body or the way you look: □ *Grant was always fussy about his personal appearance.* □ *the importance of personal hygiene*

7 personal touch □ something you do to make something special, or that makes someone feel special: □ *It's those extra personal touches that make our service better.*

8 personal best the fastest time, most points etc that a sportsman or sportswoman has ever achieved: □ *I ran 20.51 seconds for a personal best.*

9 personal development improvements in your character and skills

Appendix B
COHA 1950s–1970s

The 100 most frequent pairings
having the form *personal* [*NOUN*]
http://corpus.byu.edu/coha/?c=coha&q=7079945

personal income
personal experience
personal life
personal friend
personal interest
personal property
personal relationship
personal identity
personal appearance
personal problem
personal matter
personal reason
personal contact
personal opinion
personal physician
personal history
personal letter
personal responsibility
personal use
personal thing
personal freedom
personal gain
personal relation
personal question
personal power
personal injury
personal quality
personal service
personal loan
personal attack
personal attention
personal liberty
personal representative
personal affair
personal choice
personal ambition
personal feeling
personal view
personal fortune
personal preference
personal knowledge
personal appeal
personal effect
personal judgment
personal integrity
personal secretary
personal possession
personal popularity
personal belongings
personal tragedy
personal favor
personal consciousness
personal taste
personal touch
personal communication

Appx. B—COHA 1950s–1970s

personal safety
personal live
personal message
personal acquaintance
personal feel
personal conviction
personal style
personal diplomacy
personal affront
personal business
personal charm
personal check
personal loss
personal need
personal observation
personal triumph
personal note
personal satisfaction
personal loyalty
personal interview
personal hygiene
personal account
personal decision
personal consideration
personal habit
personal vision
personal visit
personal involvement
personal level
personal finance
personal exemption
personal concern
personal commitment
personal paper
personal pride
personal security
personal remark
personal record
personal desire
personal staff
personal sense
personal belief
personal campaign
personal basis
personal nature

Appendix C
COHA 1900s–1970s

The 100 most frequent pairings
having the form *personal* [*NOUN*]
http://corpus.byu.edu/coha/?c=coha&q=7080046

personal friend
personal experience
personal interest
personal property
personal appearance
personal income
personal service
personal life
personal contact
personal matter
personal liberty
personal relationship
personal relation
personal affair
personal opinion
personal reason
personal ambition
personal knowledge
personal quality
personal responsibility
personal representative
personal problem
personal letter
personal freedom
personal history
personal attention
personal identity
personal power
personal charm
personal injury
personal use
personal influence
personal observation
personal question
personal gain
personal belongings
personal fortune
personal feel
personal thing
personal physician
personal appeal
personal character
personal attack
personal effect
personal feeling
personal preference
personal touch
personal habit
personal interview
personal view
personal popularity
personal acquaintance
personal possession
personal note
personal integrity
personal safety

Appx. C—COHA 1900s–1970s

personal sacrifice
personal right
personal desire
personal advantage
personal business
personal friendship
personal element
personal favor
personal exemption
personal conviction
personal satisfaction
personal taste
personal loan
personal triumph
personal choice
personal affront
personal loss
personal visit
personal magnetism
personal motive
personal pride
personal profit
personal account
personal charge
personal consideration
personal hygiene
personal message
personal tragedy
personal secretary
personal loyalty
personal comfort
personal judgment
personal nature
personal characteristic
personal check
personal equation
personal enemy
personal prejudice
personal success
personal concern
personal attitude

Appendix D
TIME Magazine Corpus 1950s–1970s

The 100 most frequent pairings
having the form *personal* [*NOUN*]
http://corpus.byu.edu/time/?c=time&q=7121810

personal income
personal life
personal friend
personal fortune
personal experience
personal letter
personal attack
personal triumph
personal secretary
personal history
personal physician
personal popularity
personal problem
personal reason
personal relationship
personal use
personal loan
personal appearances
personal style
personal freedom
personal contact
personal appeal
personal choice
personal property
personal representative
personal interest
personal ambition
personal feeling
personal message
personal opinion
personal saving
personal responsibility
personal power
personal injury
personal diplomacy
personal touch
personal finance
personal appearance
personal expense
personal paper
personal tragedy
personal publicity
personal account
personal aide
personal staff
personal view
personal decision
personal integrity
personal note
personal liberty
personal matter
personal interview
personal friendship
personal conviction
personal affair
personal knowledge

personal prestige
personal relations
personal safety
personal attention
personal charm
personal vendetta
personal thing
personal statement
personal taste
personal victory
personal wealth
personal check
personal bodyguard
personal campaign
personal assistant
personal visit
personal tax
personal belongings
personal sacrifice
personal preference
personal plea
personal honor
personal gain
personal enemy
personal affront
personal philosophy
personal possession
personal quality
personal service
personal vision
personal story
personal involvement
personal loss
personal loyalty
personal command
personal encounter
personal exemption
personal effects
personal courage
personal commitment
personal agony
personal habit
personal question
personal profit

Appendix E
TIME Magazine Corpus 1923–1970s

The 100 most frequent pairings
having the form *personal* [*NOUN*]
http://corpus.byu.edu/time/?c=time&q=7122625

personal income
personal friend
personal life
personal physician
personal fortune
personal property
personal history
personal representative
personal triumph
personal experience
personal letter
personal secretary
personal popularity
personal attack
personal reason
personal appearance
personal problem
personal interest
personal liberty
personal appearances
personal opinion
personal use
personal contact
personal loan
personal ambition
personal relationship
personal freedom
personal message
personal appeal
personal note
personal choice
personal feeling
personal affair
personal charm
personal exemption
personal publicity
personal view
personal style
personal tragedy
personal injury
personal interview
personal belongings
personal power
personal safety
personal responsibility
personal matter
personal expense
personal friendship
personal touch
personal integrity
personal bodyguard
personal account
personal effects
personal check
personal paper
personal prestige

Appx. E—TIME Magazine Corpus 1923–1970s

personal staff
personal attention
personal knowledge
personal finance
personal saving
personal relations
personal gain
personal aide
personal conviction
personal profit
personal enemy
personal diplomacy
personal victory
personal service
personal sacrifice
personal visit
personal wealth
personal preference
personal decision
personal command
personal assistant
personal honor
personal habit
personal campaign
personal story
personal taste
personal thing
personal question
personal debt
personal attorney
personal journalism
personal loss
personal newsorgan
personal plane
personal tax
personal statement
personal tribute
personal vendetta
personal success
personal plea
personal feud
personal charge
personal column
personal possession

Appendix F

COCA

The 100 most frequent pairings
having the form *personal* [*NOUN*]
http://corpus.byu.edu/coca/?c=coca&q=7123549

personal life
personal computer
personal experience
personal relationship
personal responsibility
personal information
personal trainer
personal communication
personal use
personal finance
personal history
personal income
personal interest
personal level
personal problem
personal story
personal care
personal attack
personal injury
personal style
personal opinion
personal freedom
personal choice
personal view
personal property
personal identity
personal growth
personal friend
personal feeling
personal contact
personal characteristic
personal reason
personal preference
personal account
personal question
personal belief
personal goal
personal thing
personal connection
personal space
personal matter
personal favorite
personal issue
personal interview
personal item
personal need
personal touch
personal note
personal data
personal development
personal gain
personal decision
personal effect
personal health
personal safety
personal hygiene

personal assistant
personal tragedy
personal way
personal ad
personal appearance
personal value
personal quality
personal knowledge
personal control
personal power
personal involvement
personal belongings
personal behavior
personal service
personal security
personal saving
personal wealth
personal satisfaction
personal investment
personal commitment
personal letter
personal taste
personal concern
personal liberty
personal risk
personal bankruptcy
personal achievement
personal accomplishment
personal attention
personal fortune
personal meaning
personal shopper
personal expression
personal time
personal possession
personal business
personal record
personal observation
personal physician
personal exemption
personal sacrifice
personal integrity
personal distress
personal vision

Appendix G

United States Code (1992)
Pairings having the form *personal* [*NOUN*]
(partial listing)

personal account
personal action
personal adjustment counseling
personal advantage
personal aim
personal appearance
personal assets
personal assistance
personal assistant
personal baggage
personal benefit
personal bias
personal capacity
personal care
personal care services
personal characteristics
personal checks
personal choice
personal circumstances
personal civil legal affairs
personal communications system
personal conflict of interest
personal consequences
personal consultation
personal consumption
personal convenience
personal data
personal defenses
personal delivery
personal description
personal designee
personal dishonesty
personal dispute
personal effects
personal effort(s)
personal emergency situation
personal employees
personal equipment
personal estate
personal examination
personal expenses
personal favoritism
personal file
personal finance companies
personal financial counseling
personal financial difficulty(ies)
personal Foreign Service contact
personal funds
personal gain

personal hardship
personal health services
personal history
personal holidays
personal hospitality
personal hygiene practices
personal identity
personal income
personal independence
personal information
personal initiative
personal injury
personal inspection
personal inspection
personal interest
personal interview
personal investigation
personal item
personal jurisdiction
personal knowledge
personal labor
personal liability
personal library
personal loans
personal management
personal misconduct
personal mobility
personal money allowance
personal monitors
personal moral code
personal motor vehicle
personal needs
personal net worth
personal notice
personal notice
personal obligation
personal pecuniary benefit
personal possession
personal preferences
personal privacy
personal privacy interest
personal professional responsibility
personal property
personal protection
personal purposes
personal qualifications
personal rank
personal reasons
personal recognizance
personal records
personal relationships
personal religious
personal representative
personal request
personal residence
personal responsibilities
personal responsibility

personal risk liability
personal safety
personal savings
personal security
personal service
personal service income
personal services
personal solicitation
personal staff
personal statement
personal sustenance
personal theft insurance
personal traits
personal use
personal view(s)
personal violence

AMICUS
CURIAE
BRIEF

No. 09-1279

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,

Petitioners,

v.

AT&T, INC. AND COMPTEL,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND TWENTY TWO MEDIA ORGANIZATIONS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Exemption 7(C) of the federal Freedom of Information Act, 5 U.S.C. § 552(b)(7)(C), which exempts from mandatory disclosure records or information compiled for law enforcement purposes when such disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy" was ever intended to protect purported "personal privacy" rights of corporate entities.

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Argument 5

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A. Exemption 7(C) has always been applied solely to individuals to protect intimate, personal details unrelated to business conduct 5

B. Exemption 4, which protects against the disclosure of information that could result in competitive harm, has repeatedly been held not to cover embarrassing information or information that may tarnish reputation 13

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Gary Stoller, *Since 2003, 65,000 U.S. Flights with Maintenance Problems Have Taken Off Anyway*, USA TODAY, Feb. 2, 2010 .... 19, 20, 21

STATEMENT OF INTEREST[1]

Amici curiae, described fully in Appendix A, are The Reporters Committee for Freedom of the Press and twenty two media organizations — ALM Media, LLC, the American Society of News Editors, The Associated Press, the Association of American Publishers, Inc., Bay Area News Group, Bloomberg L.P., the Citizen Media Law Project, Daily News, L.P., Dow Jones & Company, Inc., The E.W. Scripps Company, the First Amendment Coalition, First Amendment Project, Gannett Co., Inc., NBC Universal, Inc., the National Press Photographers Association, Newspaper Association of America, The New York Times Co., NPR, Inc., The Society of Professional Journalists, Stephens Media LLC, Tribune Company and The Washington Post.

This case concerns an issue critical to the public and the media: whether exemption 7(C) of the federal Freedom of Information Act (hereinafter "FOIA"), 5 U.S.C. § 552(b)(7)(C), (hereinafter "Exemption 7(C)") should be interpreted to allow corporate entities to assert a right of "personal privacy" that has heretofore never been recognized. Exemption 7(C) has—until the lower court's ruling below—rightfully been interpreted as only providing protection against the disclosure of records that could reasonably constitute an unwarranted invasion of the personal privacy rights of *individuals*. Allowing a corporate entity to assert similar rights under Exemption 7(C) runs counter to the plain meaning of the term "personal privacy."

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[1] Pursuant to Sup. Ct. R. 37, counsel for *amici curiae* declare that they authored this brief in total with no assistance from the parties; that no individuals or organizations other than *amici* made a monetary contribution to the preparation and submission of this brief; that counsel for all parties were given timely notice of the intent to file this brief; and that written consent of all parties to the filing of the brief *amici curiae* has been duly filed with the Clerk.

Since FOIA was amended in 1974 to include Exemption 7(C), it has been found to protect—much like the similar privacy protection language of 5 U.S.C. § 552(b)(6) (hereinafter "Exemption 6")—the personal privacy rights of individuals only. To recognize a corporation's right to invoke Exemption 7(C) would drastically change how FOIA has been interpreted. Not only would it alter how agencies respond to future FOIA requests, but it would also severely inhibit the public's ability to keep a check on corporate behavior and government regulatory functions, requiring the public to argue that disclosure is in the public interest and outweighs a corporation's right to "personal privacy" on every claim involving any law enforcement investigation of a corporation.

FOIA already contains specific exemptions that sufficiently protect the confidentiality needs of corporations and other business entities. The existing lack of protection for public disclosures that may be merely embarrassing or call into question a corporation's business or ethical standards, and the lack of judicial recognition of a corporate privacy right heretofore is intentional. Corporate concerns do not echo those of individuals who have been granted qualified protections under Exemption 7(C). This Court should not indulge corporations in any attempt to circumvent FOIA for fear of negative publicity.

At stake is the media's ability to serve its constitutionally protected "watchdog" function by ensuring that government agencies are properly and effectively exercising their regulatory functions. Allowing corporations to keep secret results of government investigations due to the risk of negative exposure that may accompany the public disclosure of such reports would serve to insulate corporate activity from journalists and other public interest watchdog groups that work to maintain accountability and keep the public informed.

Recognizing corporate "personal privacy" rights claims under Exemption 7(C) would severely hinder the ability of journalists to investigate and report the actions of the country's most powerful entities and at the same time frustrate the media's ability to ensure that federal regulators are enforcing the law and keeping the public safe.

SUMMARY OF ARGUMENT

While corporate protections against certain records disclosures exist under FOIA for matters that are properly classified as trade secrets or confidential business information, the disclosure of which would result in actual competitive harm, courts have consistently recognized that routine operating matters related to professional business conduct are not properly defined for purposes of FOIA as matters invoking any legitimate privacy interest.

More specifically, courts have gone so far as to reject the application of Exemption 7(C) when the records at issue relate to business dealings as opposed to personal, intimate facts. This is so even when the records relate to the business affairs of individuals, not just corporate or other business entities. Additionally, within the context of Exemption 4 to FOIA, 5 U.S.C. § 552(b)(4) (hereinafter "Exemption 4"), which protects against the disclosure of trade secrets and other confidential business information, courts have also refused to hold that Exemption 4 prevents the disclosure of information that may simply be embarrassing or otherwise not in a business entity's interest to have disclosed.

Clearly, FOIA draws distinct lines between information that is truly of a private nature in both the individual and corporate context, providing withholding protections for only that limited class of records that truly implicate intimate, confidential matters in which the public has no significant interest outweighing non-disclosure.

Finally, upholding the lower court's ruling will have a detrimental impact on the media's ability to meaningfully inform the public on matters related to a variety of public safety, health and welfare issues. As the select news story examples following illustrate, the media regularly use public record data regarding regulatory investigations and citation data regarding corporations to hold corporate behavior—as well as those charged with ensuring lawful corporate compliance—accountable to the public.

Should this Court uphold the lower court's ruling and expand the meaning of "personal privacy" under Exemption 7(C) to include corporate entities, the public faces a situation where corporations will have the ability to potentially block the disclosure of a variety of records that would simply be embarrassing or otherwise not in the interest of the corporation to disclose. Indeed, Exemption 7(C) runs the risk of becoming nothing more than a corporate public relations tool.

Further, given such newfound power, the public and the media will likely be forced to file costly and protracted FOIA lawsuits in which they will be required to successfully argue why a particular disclosure would not be unwarranted under the circumstances and in the public interest any time they seek law enforcement-related records that potentially place a corporate entity in a negative light. FOIA was never intended to create such practical barriers to access in records for which a right to "personal privacy" does not properly apply.

ARGUMENT

I. FOIA rejects the application of personal privacy protections for business-related conduct and similar business attempts to avoid disclosure of embarrassing business information.

A. Exemption 7(C) has always been applied solely to individuals to protect intimate, personal details unrelated to business conduct.

Exemption 7(C) protects against records disclosures that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). This exemption has always been used to protect individuals from the release of highly personal, intimate information. The Court should not concede to corporations a right to personal privacy that was never intended by Congress and, until now, never recognized by the lower courts.

Throughout its history, Exemption 7(C) has been applied to prevent the disclosure of documents, or parts of documents, that uniquely identify individuals and concern intimate personal details "such as marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, and reputation." *Washington Post Co. v. U.S. Dep't of Justice*, 863 F.2d 96, 100 (D.C. Cir. 1988) (citing *Sims v. CIA*, 642 F.2d 562, 574 (D.C. Cir. 1980)). Records regarding personal details such as "rap sheets" and death scene photographs are the kinds of records the Court has properly found withheld under the ambit of Exemption 7(C). *See U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989); *Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157 (2004). However, when the concern is not necessarily about individuals, but related to business dealings, courts have consistently rejected Exemption 7(C)'s application. *See Washington Post*, 863 F.2d 96 (D.C. Cir. 1988); *Cohen v. Envtl. Prot. Agency*, 575 F.Supp. 425 (D.D.C. 1983); *Center to Prevent Handgun Violence v. U.S. Dep't of the Treasury*, 981 F.Supp. 20 (D.D.C. 1997).

This Court has heard two prior cases concerning Exemption 7(C), both involving individuals claiming personal privacy violations. *See Reporters Committee*, 489 U.S. 749 (1989); *Favish*, 541 U.S. 157 (2004). While these cases admittedly did not address whether a corporation can assert a "personal privacy" right under Exemption 7(C), they are nonetheless instructive as to the scope of the exemption. In *Reporters Committee*, this Court held that compiled criminal rap sheets were exempt from disclosure because releasing them would reveal very little about the actions of the Department of Defense, but would in fact reveal a wealth of information about an individual in a concise record that the Court ruled to be an invasion of personal privacy. *See Reporters Committee*, 489 U.S. at 774, 780. In so doing, the Court focused on the impact on individuals and found that because intimate details of their personal lives, that is a complete summary of one's entire criminal history, would be exposed, their personal privacy would be violated by disclosure. *See id* at 780. Of note, the Court did not hold that individual entries within a rap sheet are necessarily private, although the lower court's ruling in the instant case opens the door to allow a corporation to assert such a claim. Unlike an individual, a corporation does not have intimate, individually attributable details like those contained in criminal rap sheets. Indeed, public corporations, including AT&T, are required to disclose a wealth of information to the public under SEC regulations. There is simply no aspect of corporate life that is analogous to what was protected in *Reporters Committee*.

Further, in *Nat'l Archives and Records Admin. v. Favish*, the Court addressed the issue of whether death scene photographs of Clinton administration attorney, Vincent Foster, who died of an apparent suicide should be released against the wishes of Mr. Foster's family. *See Favish*, 541 U.S. at 160. Again, in *Favish* it was an individual's right to personal privacy under Exemption 7(C) and the intimate nature of the grieving process that was at issue. *See id.* at 167-8, 172. Corporations have no analogous personal moments in which to claim similar rights as they do not experience privacy harms resulting from personal traumas.

Recognizing that Exemption 7(C) is intended only to apply to individuals' intimate lives and related emotional harms that only human beings can be capable of suffering as a result of disclosing private information, courts have flatly rejected its applicability to professional, business-related information. Courts have consistently rejected the idea that Exemption 7(C) protects business conduct because such action is not strictly limited to one's personal, family life as they involve relationships with third parties.

In *Washington Post v. U.S. Dep't of Justice*, 863 F.2d 96 (D.C. Cir. 1988), *Cohen v. Envtl. Prot. Agency*, 575 F.Supp. 425 (D.D.C. 1983) and *Center to Prevent Handgun Violence v. U.S. Dep't of the Treasury*, 981 F.Supp. 20 (D.D.C. 1997), the documents being sought under FOIA related to the business dealings of a company and its employees. In all three cases, courts drew a sharp line separating Exemption 7(C)'s coverage of personal details from those documents that discussed business dealings and business relationships. All three cases held that business dealings were not the type of information protected by Exemption 7(C).

In *Washington Post*, the newspaper had requested access to a report compiled by a drug company that was later provided to the Food and Drug Administration and the Department of Justice when the two agencies conducted independent investigations. The report detailed the circumstances that led to the development and marketing of an arthritis drug that was later recalled after it caused severe, adverse reactions in consumers including, in some instances, death. *See Washington Post*, 863 F.2d at 98-99.

While leaving open the possibility of another FOIA exemption applying, the *Washington Post* court held that Exemption 7(C) did not apply to the report because it concerned business judgments and relationships and not information of an intimate, personal nature as intended by the exemption. *See id.* at 100. Even if the information contained within the report could tarnish one's professional reputation, the court held, the documents were not within the exemption's purview. *See id.* Again, focusing on the privacy rights of individuals, the court made an important distinction between the documents discussing general business dealings and Exemption 7(C)'s scope stating that the exemption could only apply if an individual employees' privacy interests in personally being accused of a crime were implicated. *See id.* at 100-01. "The report . . . would not reveal anything of a private nature about any employees mentioned, as it is an investigation and assessment of the business decisions . . . It may be that such a report, if it accused individual employees of having committed a crime, would implicate the privacy interest of personal honor." *Id.*

Much like in *Washington Post*, the court in *Cohen* held that Exemption 7(C) did not apply because the documents requested under FOIA identified only the business actions and not the personal lives of the individuals named within the documents. *See Cohen*, 575 F.Supp. at 429. In *Cohen*, the court had to decide whether the names of the recipients of Environmental Protection Agency "Potentially Responsible Party" notice letters should be revealed. *See id.* at 426. Notice letters were sent to handlers of hazardous wastes to inform them that they were potentially responsible for environmental clean up and remediation costs at various sites around the country. *See id.* In denying access to the letters, the EPA argued that the recipients would be subject to harassment, criticism and damage to their reputations if their names were released. *See id.* at 429.

In response, the *Cohen* court held that Exemption 7(C) only protected those intimate details of a private citizen's life such as marital status, family fights, and legitimacy of children. *See id.* at 429, (citing *Rural Hous. Alliance v. U.S. Dep't of Agric.*, 498 F.2d 73, 77 (D.C. Cir. 1974)). Exemption 7(C), the court held, "does not apply to information regarding professional or business activities." *Id.* at 429. The risk of harming a professional reputation, the court held, does not implicate Exemption 7(C). *See id.* Because the individuals in question are referenced in the documents "only in their public roles as users of hazardous waste," the court held that no exemption under FOIA, including Exemption 7(C), applied to the documents in question and therefore the documents must be released. *Id.* at 429-31.

Subsequent to *Cohen*, the U.S. District Court for the District of Columbia again found that individuals have no privacy rights in their business dealings when it held that Bureau of Alcohol, Tobacco and Firearms reports detailing the sale of multiple firearms to single buyers must be released with the gun seller's names included. *See Center to Prevent Handgun Violence*, 981 F.Supp. at 25. The court held that the gun sellers "have no privacy interest in the contents of multiple sales reports that is protected by Exemption 7(C)." *Id.* at 23. Because the gun sellers are business actors and they were not implicated in any crimes, Exemption 7(C) does not apply. *See id.* Exemption 7(C), the court held, did not apply to business judgments and business relationships. *See id.*

Other courts that have not categorically rejected Exemption 7(C) as a basis to keep business-related records secret have nonetheless discounted individual privacy rights in such documents. *See Oregon Natural Desert Ass'ns v U.S. Dep't of Interior*, 24 F.Supp. 2d 1088, 1092-93 (D. Or. 1998). Although it questioned whether Exemption 7(C) should ever be applied to the business related conduct of an individual, the court declined to strictly follow the out of circuit precedent of *Cohen*. *See id.* at 1092. Nonetheless, given the business relationship the individuals had with the government, it held that little weight should be given to the privacy interests of the cattle ranchers whose names would be revealed because the information was "not the highly personal information . . . like the rap sheets in *Reporters Committee*." *Id.* at 1093. The court held that the ranchers were not merely private citizens in the case, but business actors, so the privacy interest was greatly lessened and far inferior to the public interest in disclosure of the records, therefore Exemption 7(C) did not apply to the records. *See id.* at 1093-94.

To be sure, Exemption 7(C) was never intended to impart personal privacy protection in corporate activity. In fact, the above cases clearly show that the scope of records intended to be protected under Exemption 7(C) mirrors that of those found exempt under a similar FOIA privacy exemptions under Exemption 6 which allow agencies to withhold records of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The *Cohen* court makes an explicit observation about the relationship between the two exemptions. The difference between Exemption 6 and

Exemption 7(C) "lies in the standard of review and not in the relevant privacy interests covered." *Cohen*, 575 F. Supp. at 429, n.6. *See also*, *Oregon Natural Desert Ass'n*, 24 F.Supp. 2d at 1092 (citing *Rosenfeld v. United States Dep't of Justice*, 57 F.3d 803 (9th Cir. 1996) and noting that the distinctions between Exemption 6 and Exemption 7(C) lie in the weight given to balancing privacy and access interests and not to the scope of information covered under each exemption). Exemption 7(C) has been treated as protecting the same rights as Exemption 6 and the Court should continue to recognize Exemption 7(C) as protecting only those intimate, personal details that can only be raised by a private citizen.

In summation, the kinds of information that have been recognized as protected by Exemption 7(C) have no counterpart in the corporate world. Courts have consistently denied individuals the protection of Exemption 7(C) when their conduct is business related. Corporations have no purpose outside the business realm and, therefore, should not be granted a greater privacy right than the courts have given to individuals. If individuals cannot claim a right to "personal privacy" in business-related records, it stands to reason that corporations cannot claim a right to "personal privacy" in any corporate records as they naturally relate to business activities. This Court should therefore not interpret Exemption 7(C) in a way that recognizes "personal privacy" rights for corporations.

B. Exemption 4, which protects against the disclosure of information that could result in competitive harm, has repeatedly been held not to cover embarrassing information or information that may tarnish reputation.

Though it did not raise such an argument, should AT&T have any basis to protect the information at issue in this case, it properly lies under Exemption 4 as it addresses the kinds of information corporations have a legitimate reason to keep confidential. However, AT&T would necessarily fail under an Exemption 4 analysis as courts have routinely denied to find protection from embarrassment or unwanted publicity as a basis for withholding. Instead, AT&T now attempts to bypass Exemption 4 by relying on a strained interpretation of Exemption 7(C). Congress and the courts fail to protect corporations from embarrassment under Exemption 4, not because relief is to be found under Exemption 7(C), but rather because a corporation's interactions with government and the public are not the kinds of activities the disclosure of which by and large jeopardize competitive advantage.

Exemption 4 protects from mandatory disclosure corporate information that is considered "trade secrets and commercial or financial information." 5 U.S.C. § 552(b)(4). Exemption 4 was created to encourage corporate cooperation in agency investigations and to protect corporations from the release of private, commercial information that could result in competitive harm if it were to be obtained by third-party competitors. *See Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 767-68 (D.C. Cir. 1974).

To be found exempt from disclosure under Exemption 4, the documents at issue must be a trade secret or found to be "confidential." 5 U.S.C. § 552(b)(4). The test for determining whether a document is confidential under FOIA is set forth in *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d at 770. In that case, the court held that a document "is 'confidential' for the purposes of the exemption if the disclosure of the information is likely to . . . cause substantial harm to the competitive position of the person from whom the information was obtained." *Id.* To fall under Exemption 4, the requirement involves "both a showing of actual competition and a likelihood of substantial competitive injury." *CNA Fin. Corp. v. Donovan* 830 F.2d 1132, 1152 (D.C. Cir. 1987).

Under this standard, many companies have attempted to argue that harm to their reputation constitutes the type of harm contemplated by the statute and by the court in *National Parks*. However, courts have rejected this idea, finding that reputational harm is not protected by Exemption 4.

An early case to address claims of reputational harm under Exemption 4 was *Public Citizen Health Research Group v. Food and Drug Administration*, which in part relied on a 1981 law review article to conclude that Exemption 4 does not protect against such harms. *See Public Citizen*, 704 F.2d 1280, 1291. In *Public Citizen*, the court found that reports detailing the health and safety of an eye-care product was not a trade secret under Exemption 4 and therefore would only be exempt if the reports constituted "confidential commercial information." *Id.* at 1290. In defining the standard for proving competitive harm, the court emphasized a point from the law review article that competitive harm is only that which flows "from the affirmative use of proprietary information *by competitors*." *Id.* at 1291 n.30 (citing Mark Q. Connelly, *Secrets and Smokescreens: A Legal and Economic Analysis of Government Disclosures of Business Data*, 1981 Wis. L. Rev. 207, 235-36 (1981)) (emphasis in original).

Connelly's article continued to state that "[c]ompetitive harm should not be taken to mean simply any injury to competitive position, as might flow from customer or employee disgruntlement or from the embarrassing publicity attendant upon public revelations." Connelly, *supra*, at 235-36. The Seventh Circuit U.S. Court of Appeals also adopted the idea that competitive harm under Exemption 4 does not include embarrassing facts in *General Electric Co. v. U.S. Nuclear Regulatory Comm'n*. 750 F.2d 1394, 1402 (7th Cir. 1984). General Electric was attempting to keep secret a report about GE's "boiling water" nuclear reactor which included some criticism of the safety and design of the reactor. *See id.* at 1396. In rejecting GE's competitive harm argument, the court held that "the competitive harm that attends any embarrassing disclosure is not the sort of thing that triggers exemption 4." *Id.* at 1402.

Similarly, in *CNA Fin. Corp. v. Donovan*, CNA was attempting to prevent disclosure of records detailing the company's hiring and promotion practices that were on file with the Department of Labor. *CNA Fin. Corp.*, 830 F.2d at 1134. Among the information contained in the records were statistics on the racial and sexual composition of the company's employees and the racial and sexual makeup of applicants hired and of employees promoted internally, statistics that CNA was required to submit to the government as a condition of a contract. *See id.* at 1154. CNA argued that it would be competitively harmed because the reports could cause negative publicity and cause its employees to be "demoralized." *Id.* The court rejected this argument, holding that "such complaints [are] unrelated to the policy behind Exemption 4." *Id.*

When the government regulates an industry or contracts to private companies, the public has a right to know that the government is doing its job and upholding its laws. If companies like CNA were allowed to keep secret the results of government investigations or government compliance reports, the general public would have no way to ensure accountability. The *CNA* court correctly found that the potential embarrassment for CNA was not a valid claim.

In 2010, the U.S. Court of Appeals for the District of Columba once again rejected the argument that bad publicity or embarrassment could amount to competitive harm under Exemption 4 in *United Technologies Corp. v. U.S. Dep't of Defense*. *See* 601 F.3d 557 (D.C. Cir. 2010). The *United Technologies* court was reviewing a Department of Defense decision to release records that evaluated the quality control processes of helicopter and aircraft engine manufacturers. *See id.* at 559. The manufacturers claimed, among other things, that the release of these records could make potential customers doubt the quality of their products and their reputations would suffer. *See id.* at 563.

The court ultimately held that the documents were exempt because technical information contained within the reports could be used by competitors, but the court also addressed the manufacturer's reputational harm argument. *See id.* at 563-64. "Calling customers' attention to unfavorable agency evaluations or unfavorable press does not amount to an 'affirmative use of proprietary information by competitors.'" *Id.* (citing *CNA Fin. Corp.*, 830 F.2d at 1154 & n.158). As it has since *Public Citizen* in 1983, the court held that Exemption 4 does not protect a corporation from the threat of bad publicity or embarrassment. *See id.* at 564.

Exemption 4 is meant to protect corporations from the damage that can occur from the release of documents that are generated or collected by government agencies. Over the years, courts have specifically refused to extend Exemption 4 beyond actual competitive harm that would be inflicted by a competitor to include embarrassment and bad publicity. This Court should not allow AT&T and other corporate entities to circumvent well-established law denying corporate reputational embarrassment and similar claims by allowing them to assert personal privacy rights under Exemption 7(C). The obvious motive for corporate entities to seek to withhold information would be to avoid the negative consequences be they commercial, legal or otherwise. It is exactly this reasoning that courts have repeatedly rejected under Exemption 4—and AT&T does not raise the claim in this case—and it is instructive in the present case as it demonstrates FOIA's reluctance to recognize any sort of corporate privacy right analogous to individual privacy rights. This Court should find that corporations do not have personal privacy rights and uphold the precedent that embarrassing publicity is not a valid argument under FOIA.

Allowing AT&T and other corporations to assert "personal privacy" under Exemption 7(C) would potentially keep secret a wealth of documents that have previously been held open to public inspection. Agencies will be required to conduct public interest/privacy balancing tests on nearly every document requested that relates to a corporation. The negative effects on the press and the public would be enormous, creating a nearly insurmountable obstacle to access.

II. Recognizing corporate "personal privacy" rights under Exemption 7(C) will hinder journalists' ability to perform their constitutionally protected "watchdog" role and inform the public about corporate action bearing upon public health, safety and welfare.

Creating a new category of privacy for corporations would create a severe impediment to journalists (as well as various public interest stakeholders) that depend on FOIA to enable their "watchdog" function of monitoring government agencies and their regulatory functions and through them the corporate power structure. In this case, AT&T is seeking to block the disclosure of a wealth of records compiled by the FCC in relation to the commission's investigation into whether AT&T overcharged the government for services rendered in connection with its participation in a federal telecommunications buildout program. The public has a great interest in such records as they bear directly upon the public welfare and whether corporations are properly billing the government for taxpayer funded initiatives.

What follows are examples of how journalists have effectively used records detailing government investigations of corporate behavior for the public good that the lower court's expansion of Exemption 7(C) could make exempt—namely records related to government safety and health inspections.

A. Dangerous Safety Records

In February 2010, Gary Stoller, a reporter for USA Today, used records obtained through federal FOIA over a six-month period to aid in uncovering massive maintenance problems on thousands of U.S. commercial airline flights, as well as lapses in Federal Aviation Administration ("FAA") oversight of airline safety over the past six years. *See* Gary Stoller, *Since 2003, 65,000 U.S. Flights With Maintenance Problems Have Taken Off Anyway*, USA TODAY, Feb. 2, 2010, at 1A. Stoller primarily relied on records obtained from the FAA through FOIA that detailed how, over the past six years, millions of passengers have been on at least 65,000 U.S. flights that should not have taken off because planes were not properly maintained and that unqualified mechanics and lax oversight by airlines and federal authorities are commonplace. *See id.*

The information Stoller obtained through FOIA primarily consisted of government fines against airlines for maintenance violations and penalty letters sent to the airlines. Using these documents, Stoller was able to uncover "repeated instances in the past six years of shoddy maintenance and improper procedures done by ill-trained and ill-equipped workers, even some instances of cover-ups of bad repairs that put fliers' safety in jeopardy." *Id.*

Stoller provided several particularly alarming examples of maintenance problems in his investigation, including, for example, mechanics being assigned to assess a possible engine leak on a passenger jet who had not received training on engine troubleshooting and who had no maintenance manuals or required tools to address the problems; an Alaska-based airline that sustained several accidents and maintenance violations and that flew passengers on planes with missing, loose, corroded and damaged parts, and whose maintenance personnel falsified repair entries in company logbooks; and an American Eagle plane that took off even though the airline had prior knowledge of problems with the aircraft, and that had flown "in an unairworthy condition" on at least 20 flights. *See id.*

The obtained documents showed that the FAA levied $28.2 million in fines against 25 U.S. airlines for maintenance violations in the past six years. *See id.* However, despite fines and punishments from the FAA, the documents also revealed that airlines often disregarded FAA inspectors' findings and continued to fly aircraft with maintenance issues, deferred necessary repairs beyond required time frames, used unapproved parts and performed maintenance work that was well below federal standards. *See id.*

Thus, it is clear from these findings that FAA oversight and enforcement of many airlines' poor safety records is not strong enough to deter further violations or to truly ensure safety of passengers on U.S. commercial flights. A 2005 report by Dept. of Transportation Inspector General Calvin Scovel, which he delivered to a Congressional House subcommittee, supported this notion, finding that uncertified repair stations were performing maintenance work that is critical to aircraft safety without the FAA's knowledge. *See id.* Scovel said that there may be a lag of months or even years before FAA inspectors conduct an on-site review of maintenance and repair stations after an airline approves them for use. *See id.* He also said this untimely and flawed approval and inspection process has allowed potentially life-threatening maintenance problems to go undetected or to reoccur. *See id.*

Had Stoller not had access to the government's inspection documents, it is uncertain whether the public would have been made aware of the FAA's findings regarding serious maintenance and safety violations on thousands of flights carrying millions of passengers, especially considering that multiple sources, as well as the FAA's own documents, show that the administration is often ineffective in preventing these problems from taking place or reoccurring. If journalists are not allowed access to these types of documents because of asserted privacy rights raised by private entities, the public will be deprived of a wealth of knowledge that government regulators have often proved ineffective at communicating.

In a similar investigation, the *St. Petersburg Times* reviewed hundreds of pages of letters, memos and maintenance records regarding government inspections of the Atlanta-based airline ValuJet released through federal FOIA, focusing primarily on a letter from the FAA requiring the company to get federal approval before purchasing any new aircraft or starting services to new cities. *See* Bill Adair, *FAA Saw ValuJet Trouble Ahead*, ST. PETERSBURG TIMES, June 4, 1996. Federal inspectors had been made aware of several problems to look for when evaluating ValuJet's maintenance and safety procedures, including inexperienced pilots, incomplete paperwork for passengers and cargo, faulty emergency equipment, inadequate safety checks, overuse of outside contractors for maintenance, and a possible rush to get planes into service. *See id.*

After a series of accidents and other maintenance issues involving the company's planes, the FAA wrote a letter to ValuJet's president ordering the company to cease purchasing new aircraft or starting flight services to new cities without FAA approval. In the letter, the FAA wrote to ValuJet president Lewis Jordan:

> It appears that ValuJet does not have a structure in place to handle your rapid growth and that you may have an organizational culture that is in conflict with operating to the highest possible degree of safety . . . Specifically, it seems that your corporate policies have created a culture that is affecting and influencing the ability of aircraft captains to make safety-oriented decisions. *Id.*

However, the FAA did not publicize its action requesting that ValuJet cease further expansion, and at the time of publication of the Times' article, most major news organizations were not covering the story, and reporters were not inquiring with the FAA about the issue. *See id.*

If the *Times* had been unable to review the FAA's letter and other documents related to ValuJet's safety record, the public might have never learned about the many problems with the company, because the FAA did not make its action public and other reporters were not covering the story. This case shows that journalists are vital to creating public awareness about serious safety issues when federal regulators do not fulfill this role. Surely if a corporate privacy right were to be created under Exemption 7(C), ValuJet would seek to have such information hidden from the public because it is embarrassing, not to mention potentially fatal.

Similar safety issues abound beyond those highlighted above regarding airline safety in other sectors as well. Earlier this year, *Chicago Tribune* reporter Ron Grossman investigated a complaint filed by Matt Simon, a former security guard at an Illinois nuclear plant, who claimed he was terminated for trying to alert management to serious security lapses at the plant. *See* Ron Grossman, *Lawsuit Questions Power Plant's Safety*, CHICAGO TRIBUNE, Apr. 4, 2010.

Using federal FOIA, the *Tribune* obtained a copy of the Department of Labor's investigation report of Simon's complaint, in which he alleged that "there was a consistent policy of dumbing down security training and certifying unqualified guards." *See id.* Simon alleged that rifles and other equipment failed, plant officials filed false security reports with the Nuclear Regulatory Commission and that his firing resulted directly from his speaking out about such security failures. *See id.* The story included specific examples of alleged attempts by the plant to cover up security problems:

> In his complaint, [Simon] said he was warned about keeping the guards' failure rates low. "Managers' bonuses would be affected," Simon wrote. "Therefore managers had a financial incentive to qualify individuals regardless of safety concerns." *Id.*
>
> Simon reported one trainee walked into a glass wall and fell down on the rifle range. "Exelon management," Simon wrote, "made veiled threats and said I should qualify" the

> 72-year-old guard, who had recently had heart surgery. *Id.*

Grossman further reported that the plant dismissed Simon's allegations after an internal investigation determined they were false. *See id.* His attorneys then filed suit with the Labor Department "requesting a hearing according to a federal law protecting whistle-blowing employees of nuclear power companies," which the department rejected. Simon later appealed that decision, and his attorney argued that the case raised an important question about the larger safety of U.S. nuclear plants. *Id.*

The Project on Government Oversight, a Washington-based whistleblower support group, agreed with the attorney's assertions about plant safety, saying it "has interviewed hundreds of guards at nuclear power plants, many of whom said they weren't adequately trained or equipped." *Id.*

Without access to the Labor Department's investigation of the complaint, the public likely would not have been alerted to these larger security concerns at U.S. power plants, especially since the Labor Department, which is charged with addressing such concerns, initially rejected Simon's request for a hearing. Once again, a corporate right to personal privacy under 7(C) could very well prevent the public from ever knowing about such allegations.

The Arizona Republic conducted an investigation into unsafe conditions at a copper mine near Tucson after a veteran miner was killed in a rock-fall in yet another example of uncovered corporate malfeasance. *See* Craig Harris and Jerry Kammer, *Even Before the Fatal Cave-in, the Feds Were Told That the Copper Mine Near Tucson was Unsafe*, THE ARIZONA

REPUBLIC, Aug. 6, 2000. The *Republic's* investigation, conducted through interviews with miners and regulators and through documents obtained under state and federal FOIA requests, found that federal regulators at the Mine Safety and Health Administration ("MSHA") repeatedly failed to investigate complaints regarding the unsafe conditions at the Asarco Inc. Mission Mine for months prior to the death of the miner. *See id.* The miner himself, along with his family, was among those warning MSHA about the unsafe conditions. *See id.*

The newspaper's investigation found several lapses in safety at the plant, including:

> *Mission Mine management refused to regularly install safety bolts, used to prevent falling rocks, despite repeated complaints from miners.
>
> *Miners collapsed and got sick from working without fans in extremely humid areas where temperatures hovered around 100 degrees, while MSHA inspectors rode in Asarco's air-conditioned vehicles to conduct inspections.
>
> *Asarco cordoned off unsafe areas to keep inspectors out even though miners regularly worked there.
>
> *Mine managers ordered a supervisor to "build cases" and fire employees who complained about safety problems.
>
> *The supervisor of the MSHA's Mesa office admitted he didn't take seriously three anonymous safety complaints about the mine that were received months before the acci-

> dent. The complaints were from Maria Villanueva, a grown daughter of the dead miner, who said she remained anonymous to prevent retaliation against her father. *Id.*

Although the Arizona Mine Inspector's Office found no violations in all of 1999, including during a November inspection just weeks prior to the January 2000 accident, documents showed that MSHA had been warned about problems at the mine through an anonymous letter it received in January 1999. *See id.* However, MSHA records also showed that the office supervisor did nothing with the letter until March, when MSHA conducted a routine inspection. *See id.* The MSHA records also show that the fallen miner's daughter complained to the same MSHA office three times from May to September 1999, but that the same supervisor did not record the complaints or send an inspector to investigate. *See id.*

The *Republic* reported that after the miner's death, the U.S. Secretary of Labor launched an investigation into MSHA's conduct prior to the accident. *See id.* Davitt McAteer, who headed MSHA at the time, acknowledged the poor oversight by its local office near the mine that ignored the complaints. However, according to the article, "the field supervisor who received the complaints was not punished. Instead, he was transferred to Denver, where his salary was raised." *Id.*

The *Republic's* investigation into the accident and other mine safety issues was crucial to shedding light on the serious lapses in safety and oversight at the Arizona mine. Without this reporting, it is unclear whether the public would have learned about these problems, especially since the Labor Department did not even begin an investigation into safety issues regarding the miner's death until six weeks after the *Republic* began its own investigation of MSHA documents and officials. It is also quite possible that the newspaper's action was what spurred the larger Labor Department investigation. Of course, could such documents potentially be withheld under Exemption 7(C), none of this would have potentially come to light.

B. Public Health Violations

Last summer, *USA Today* reporter Gary Stoller undertook yet another investigation of safety concerns at several U.S. airlines, this time regarding unsanitary health conditions related to food provided during in-flight meals. Through a federal FOIA request, Stoller obtained inspection reports from the Food and Drug Administration ("FDA") showing that many meals served on major airlines are prepared in unsanitary and unsafe conditions that could lead to illness, citing three of the largest catering facilities that were suspected for health and sanitation violations. *See* Gary Stoller, *FDA Finds Food Safety Issues at Airline Caterers*, USA TODAY, June 28, 2010; Gary Stoller, *Airline Food Could Pose Health Threat*, DETROIT FREE PRESS, June 28, 2010.

The reports show that these major catering facilities are in violation of a number of health codes by storing food at improper temperatures, using unclean equipment and employing workers with poor hygiene. Several instances of cockroaches, flies and mice ending up in airline food were common. *See* Gary Stoller, *Airline Food Could Pose Health Threat*, DETROIT FREE PRESS, June 28, 2010. Samples from a kitchen floor of one of the catering companies tested positive for Listeria, a serious and often deadly bacteria. *See* Gary Stoller, *FDA Finds Food Safety Issues at Airline Caterers*, USA TODAY, June 28, 2010. The inspection reports also showed that despite warning letters from the FDA over health and sanitation violations, caterers have continued to ignore FDA health guidelines and requirements on food preparation. *See id.*

In this case, Stoller's access to FDA inspection records was vital to providing information to the public about a serious and potentially life-threatening health issue that could affect millions of travelers on U.S. commercial flights. It is especially important that the public learn this information because of the FDA's inability to ensure that catering companies are following strict public health guidelines, even after warnings have been issued. According to Roy Costa, a public health official consulted for the investigation, "In spite of best efforts by the FDA and industry, the situation with in-flight catered foods is disturbing, getting worse and now poses a real risk of illness and injury to tens of thousands of airline passengers on a daily basis." *See* Stoller, *Airline Food Could Pose Health Threat*, DETROIT FREE PRESS, June 28, 2010.

In a similar investigation published in the *Chicago Tribune*, the *Detroit Free Press* obtained a report through federal FOIA containing statements given by workers and a meat inspector at a Sara Lee Corp. plant in western Michigan to federal criminal investigators at the U.S. Department of Agriculture's ("USDA") Office of the Inspector General. *See* Jennifer Dixon, *Bosses Knew Shipped Meat was Tainted*, *Workers Say*, CHICAGO TRIBUNE, Aug. 30, 2001. The workers and the inspector alleged that mangers at the plant knew they were shipping tainted meats just months before people began dying of a nationwide Listeria outbreak in 1998. *See id.*

In the report, one employee told investigators that meat products made at the plant were contaminated with Listeria, and that management was also aware of this fact. *See id.* A federal meat inspector also told investigators that management knew their meat products were tainted, but that they deliberately ignored the law and shipped the food without testing it. *See id.* Eight months after the meat was shipped, a nationwide listeriosis outbreak occurred, killing 15, causing six miscarriages and sickening 101 people. *See id.* Sara Lee recalled 35 million pounds of meat in wake of the outbreak. *See id.*

According to the article, three months prior to the outbreak, investigators found documents showing that the plant issued a credit for over 200 cases of turkey to a business in San Diego after the meat had tested positive for Listeria. *See id.* The meat inspector also told the USDA that plant workers were aware of the listeria problem an entire year before the outbreak. *See id.* The federal investigators' report shows that the inspector told an employee at the plant that it risked violating the law if the tainted meat was shipped, to which the employee replied: "They would never know it was our product since [listeria] has about a two-week incubation period." *Id.* Another employee told investigators that lab workers were instructed by plant management to test only for conditions under which the bacterium can grow, and not for the actual presence of bacteria.

See id. They were also told to keep test results in a special file, and to withhold these results from the USDA, according to the report. *See id.*

Despite these findings, however, federal prosecutors priorly "uncovered no evidence that Sara Lee intentionally distributed the adulterated meat product," charging Sara Lee only with a federal misdemeanor in the 1998-1999 outbreak and forcing the company to pay a fine and donate money to Michigan State University for food safety research. *Id.* In response to this ruling, a former meat-inspection chief at USDA responded, "If [Sara Lee management] set out to defraud the system, they succeeded . . . It's shocking and appalling, and furthermore, it encourages other companies to be criminally lax." *Id.*

Beyond food safety issues, other examples of public health violations by private companies abound. In September 2009, *The New York Times* obtained hundreds of thousands of nationwide water pollution records from the Environmental Protection Agency (EPA) and compiled a national database of water pollution violations that "is more comprehensive than those maintained by states or the E.P.A." *See* Charles Duhigg, *Clean Water Laws Neglected, at a Cost*, N.Y. TIMES, Sept. 13, 2009. The subsequent investigative report produced from this reporting found that:

> In the last five years alone, chemical factories, manufacturing plants and other workplaces have violated water pollution laws more than half a million times. The violations range from failing to report emissions to dumping toxins at concentrations regula-

> tors say might contribute to cancer, birth defects and other illnesses. However, the vast majority of those polluters have escaped punishment. State officials have repeatedly ignored obvious illegal dumping, and the [EPA], which can prosecute polluters when states fail to act, has often declined to intervene. *Id.*

The *Times*' story also showed that around one in 10 Americans has been exposed to drinking water containing dangerous chemicals or that fails to meet federal public health standards. *See id.* In one example, some coal companies in West Virginia disclosed to federal regulators that the companies were pumping illegal amounts of chemicals into the ground, resulting in concentrations of arsenic, lead and other dangerous chemicals appearing in local residents' tap water and causing health problems. *See id.* However, state regulators never fined or punished those companies for breaking pollution laws. The story also details at-length the impact this pollution has had on the health of local residents:

> [Jennifer Hall-Massey's] entire family tries to avoid any contact with the water. Her youngest son has scabs on his arms, legs and chest where the bathwater – polluted with lead, nickel and other heavy metals – caused painful rashes. Many of his brother's teeth were capped to replace enamel that was eaten away. Neighbors apply special lotions after showering because their skin burns. Tests show that their tap water contains arsenic, barium, lead, manganese and other chemicals at concentrations federal

> regulators say could contribute to cancer and damage the kidneys and nervous system. *Id.*

This article is another strong example of the power of investigative reporting to reveal the truth by having access to records that could potentially be protected under Exemption 7(C), particularly when federal agencies prove unable, or in this case, unwilling, to hold companies liable for violating health and safety practices.

The above stories are certainly not exhaustive of the wealth of public-interest reporting that is enabled by access to the very records at risk of being closed to the public if the lower court's ruling is allowed to stand. It is clearly evident that the public needs access to inspection reports and similar corporate investigatory records in which businesses would likely claim Exemption 7(C) privacy rights in order to make abuses such as what is detailed herein known. Given its critical importance to the public, such access should not further be conditioned upon having to resort to legal action or otherwise engaging in any public interest argument at the outset of the request lest practical barriers and tactical, defensive postures so frustrate the request process that they work to effectively bar access.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reverse the decision of the U.S. Court of Appeals for the Third Circuit and hold that corporate entities do not have "personal" privacy rights under Exemption 7(C) and therefore the exemption cannot be invoked by corporations nor relied upon by government agencies as a basis to withhold any record properly requested under FOIA.

Respectfully submitted,

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November 15, 2010

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APPENDIX A

Descriptions of *amici*:

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

ALM Media, LLC publishes over thirty national and regional magazines and newspapers, including The American Lawyer, the New York Law Journal, Corporate Counsel, and the National Law Journal as well as the website Law.com. Many of ALM's publications have long histories reporting on legal issues and serving their local legal communities. ALM's The Recorder, for example, has been published in Northern California since 1877; the New York Law Journal was begun a few years later, in 1888. ALM's publications have won numerous awards for their coverage of critical national and local legal stories, including many stories that have been later picked up by other national media. ALM Media, LLC is privately owned, and no publicly held corporation owns 10 percent or more of its stock.

With some 500 members, The American Society of News Editors ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to the American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922, as the American Society of Newspaper

Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

The Associated Press ("AP") is a global news agency organized as a mutual news cooperative under the New York Not-for-Profit Corporation Law. AP's members include approximately 1,500 daily newspapers and 25,000 broadcast news outlets throughout the United States. AP has its headquarters and main news operations in New York City and has staff in 321 locations worldwide. AP news reports in print and electronic formats of every kind, reaching a subscriber base that includes newspapers, broadcast stations, news networks and online information distributors in 116 countries.

The Association of American Publishers, Inc. ("AAP") is the national trade association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses, and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary, and professional markets, scholarly journals, computer software, and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

Bay Area News Group is operated by MediaNews Group, one of the largest newspaper companies in the United States with newspapers throughout California and the nation. The Bay Area News Group includes the San Jose Mercury News, Oakland Tribune, Contra Costa Times, Marin Independent Journal, West County Times, Valley Times, East County Times, Tri-Valley Herald, The Daily Review, The Argus, Santa Cruz Sentinel, San Mateo County Times, Vallejo Times Herald, and Vacaville Reporter. These newspapers rely on open government laws, including the federal Freedom of Information Act, to provide vital information to the public about government and corporate activities that affect their lives.

Bloomberg L.P., based in New York City, operates Bloomberg News, which is comprised of more than 1,500 professionals in 145 bureaus around the world. Bloomberg News publishes more than 6,000 news stories each day, and The Bloomberg Professional Service maintains an archive of more than 15 million stories and multimedia reports and a photo library comprised of more than 290,000 images. Bloomberg News also operates as a wire service, syndicating news and data to over 450 newspapers worldwide with a combined circulation of 80 million people, in more than 160 countries. Bloomberg News operates cable and satellite television news channels broadcasting worldwide; WBBR, a 24-hour business news radio station which syndicates reports to more than 840 radio stations worldwide; Bloomberg Markets and Bloomberg BusinessWeek Magazines; and Bloomberg.com which receives 3.5 million individual user visits each month.

The Citizen Media Law Project ("CMLP") provides legal assistance, education, and resources for individuals and organizations involved in online and citizen media. CMLP is jointly affiliated with Harvard University's Berkman Center for Internet & Society, a research center founded to explore cyberspace, share in its study, and help pioneer its development.

and the Center for Citizen Media, an initiative to enhance and expand grassroots media. CMLP is an unincorporated association hosted at Harvard Law School, a non-profit educational institution.

Daily News, L.P., publishes the New York *Daily News*, a daily newspaper that serves primarily the New York metropolitan area and is sixth-largest paper in the country by circulation. The *Daily News*' website, nydailynews.com, receives approximately 22 million unique visitors each month.

Dow Jones & Company, Inc. is the publisher of The Wall Street Journal, a daily newspaper with a national circulation of over two million, WSJ.com, a news website with more than one million paid subscribers, Barron's, a weekly business and finance magazine, and through its Dow Jones Local Media Group, community newspapers throughout the United States. In addition, Dow Jones provides real-time financial news around the world through Dow Jones Newswires as well as news and other business and financial information through Dow Jones Factiva and Dow Jones Financial Information Services.

The E.W. Scripps Company is a diverse, 131-year-old media enterprise with interests in television stations, newspapers, local news and information Web sites, and licensing and syndication. The company's portfolio of locally-focused media properties includes: 10 TV stations (six ABC affiliates, three NBC affiliates and one independent); daily and community newspapers in 13 markets; and the Washington, D.C.-based Scripps Media Center, home of the Scripps Howard News Service.

The First Amendment Coalition is a non-profit public interest organization dedicated to defending free speech, free press, and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

First Amendment Project is a nonprofit organization dedicated to providing free legal services on public interest free speech and free press matters to its core constituency of activists, journalists and artists. FAP frequently represents clients in FOIA cases and in doing so frequently encounters exemption 7(C). As many of FAP's clients use FOIA to uncover corporate malfeasance and corporate influence on government, the extension of Exemption 7(C) to corporate privacy would severely limit the ability of FAP's clients to inform the public of important information.

Gannett Co., Inc. ("Gannett") is an international news and information company that publishes 84 daily newspapers in the United States, including USA TODAY, and nearly 850 non-daily publications, including USA Weekend, a weekly newspaper magazine. Gannett also owns 23 television stations, and over 100 U.S. websites that are integrated with its publishing and broadcast operations.

NBC Universal is one of the world's leading media and entertainment companies in the development, production, and marketing of news, entertainment and information to a global audience. Among other businesses, NBC Universal owns and operates the NBC television network, the Spanish-language television network Telemundo, NBC News, several news and entertainment networks including MSNBC and CNBC, and a television stations group consisting of owned-and-operated television stations that produce substantial amounts of local news, sports and public affairs programming. NBC News produces the "Today" show, "NBC Nightly News with Brian Williams," "Dateline NBC" and "Meet the Press." NBC Universal, Inc. is 87.7% owned by National Broadcasting Company Holding, Inc. (a wholly-owned subsidiary of General Electric Company) and 12% by Vivendi, S.A.

The National Press Photographers Association ("NPPA") is a non-profit organization dedicated to the advancement of photojournalism in its creation, editing and distribution. NPPA's almost 9,000 members include television and still photographers, editors, students and representatives of businesses that serve the photojournalism industry. Since 1946, the NPPA has vigorously promoted freedom of the press in all its forms, especially as that freedom relates to photojournalism.

Newspaper Association of America ("NAA") is a non-profit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. One of NAA's key priorities is to advance newspapers' First Amendment interests, including the ability to gather and report the news.

The New York Times Company is the publisher of the New York Times, the International Herald Tribune, The Boston Globe, and 15 other daily newspapers. It also owns and operates more than 50 websites, including nytimes.com, Boston.com and About.com.

NPR, Inc. is an award winning producer and distributor of noncommercial news programming. A privately supported, not-for-profit membership organization, NPR serves a growing audience of more than 26 million listeners each week by providing news programming to 285 member stations which are independently operated, noncommercial public radio stations. In addition, NPR provides original online content and audio streaming of its news programming. NPR.org offers hourly newscasts, special features and ten years of archived audio and information. NPR has no parent company and does not issue stock.

The Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

Stephens Media LLC is a nationwide newspaper publisher with operations from North Carolina to Hawaii. It publishes the largest newspaper in Nevada, the Las Vegas Review-Journal.

Tribune Company operates broadcasting, publishing and interactive businesses, engaging in the coverage and dissemination of news and entertainment programming. On the broadcasting side, it owns 23 television stations, a radio station, a 24-hour regional cable news network and "Superstation" WGN America. On the publishing side, Tribune publishes eight daily newspapers — Chicago Tribune, Hartford Courant, Los Angeles Times, Orlando Sentinel (Central Florida), The (Baltimore) Sun, The Daily Press (Hampton Roads, Virginia) The Morning Call (Allentown, Pa.), and South Florida Sun-Sentinel. Tribune Company is a privately held company.

The Washington Post is a leading newspaper with nationwide daily circulation of over 623,000 and a Sunday circulation of over 845,000.

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